89-427

No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, *et al.*,
Petitioners,

v.

THE LONG ISLAND RAILROAD COMPANY, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

The court of appeals ruled that the Railway Labor Act (RLA) overrides the Norris-LaGuardia Act and grants the federal courts the authority to enjoin sympathetic refusals to cross a picket line set up by employees engaged in a lawful primary strike where the applicable collective bargaining agreement is reasonably susceptible to being read to ban such sympathy strikes. The questions presented are:

(1) Whether, in the industries governed by the RLA, the federal courts have, in particular, the authority to enter status quo injunctions, pending arbitration, against sympathy strikes alleged to be in breach of the applicable collective bargaining agreement.

(2) Whether the federal courts have, in general, the authority to enter-status quo injunctions, pending arbitration, against actions alleged to be in breach of an RLA collective bargaining agreement.

(3) If the foregoing questions are answered in the affirmative, whether an employer seeking an injunction against sympathetic refusals to cross a picket line set up by employees engaged in a lawful RLA strike must make a showing (a) that the applicable collective bargaining agreement constitutes a clear and unmistakable waiver of the right to engage in sympathy strikes and (b) that a consideration of all the equities—including those of the employees engaged in the lawful primary strike—requires the issuance of an injunction.

LIST OF PARTIES

A complete list of the parties in the proceedings below is set out in Appendix G. App. 96a-102a.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners International Association of Machinists and Aerospace Workers, *et al.*, pray that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Second Circuit entered in *Long Island Railroad Co. et al. v. International Association of Machinists et al.*, 874 F.2d 901 (2d Cir. Nos. 1093, 1104-1106) on April 10, 1989.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 874 F.2d 901 and is printed as Appendix A hereto. App. 1a-31a. The opinion and order of the United States District Court for the Southern District of New York, reported at 709 F. Supp. 376, and the district court's preliminary injunction

orders, which are unreported, are printed as Appendix B hereto. App. 32a-76a.

JURISDICTION

The judgment of the court of appeals was entered on April 10, 1989. App. 90a. That court denied a timely petition for rehearing on May 16, 1989. App. 91a. On August 2, 1989, Justice Marshall signed an order extending the time for filing a petition for writ of certiorari to and including September 13, 1989. App. 92a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Section 1 of the Norris-LaGuardia Act provides:

> No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter.

29 U.S.C. § 101.

Section 4 of the Norris-LaGuardia Act provides in part:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:
>
> (a) Ceasing or refusing to perform any work or to remain in any relation of employment; . . .
>
> (e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

> (f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;
>
> (g) Advising or notifying any person of an intention to do any of the acts heretofore specified;
>
> (h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and
>
> (i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title.

29 U.S.C. § 104 (a), (e), (f), (g), (h), (i).

Section 2, First of the Railway Labor Act provides:

> It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

45 U.S.C. § 152, First.

STATEMENT OF THE CASE

At 12:01 a.m. on Saturday, March 4, 1989, employees of Eastern Air Lines ("Eastern") represented by the International Association of Machinists and Aerospace Workers ("IAM") began a lawful strike against Eastern. The Eastern strikers' plan, as they publicly stated, App. 16a, rested heavily on the full-fledged use of the economic weapon of secondary picketing appealing to other organized employees and seeking the latter's aid through sympathy strikes. *See Burlington Northern v. Maintenance Employes*, 481 U.S. 429 (1987) (upholding the legality of such picketing).

On the day the Eastern strike began—and before any picket lines were established—respondents The Long Island Railroad Company, Metro-North Commuter Rail-

road Company, and NJ Transit Rail Operations, Inc. moved in the district court for temporary restraining orders barring petitioner unions and union officers from honoring any IAM picket lines established at their facilities. The railroads argued that despite the absence of "no strike" clauses in the relevant collective bargaining agreements, those agreements "assume" a regular and on-going working relationship which, taken together with the purposes of the Railway Labor Act, 45 U.S.C. §§ 151-88 ("RLA"), and the obligations of RLA § 2, First, 45 U.S.C. § 152, First, would bar the threatened sympathy strikes. *See* App. 53a.

On Sunday, March 5, 1989, such temporary restraining orders were issued. The National Railroad Passenger Corporation obtained a similar temporary restraining order the next day. On March 13, 1989, the district court granted the railroads' motions for preliminary injunctions. App. 18a. The formal preliminary injunctions were issued on March 17, 1989, and filed on March 20, 1989. App. 18a. The court of appeals then affirmed the district court orders, holding that while the lower courts are divided on the issue, "the unions here may not engage in a sympathy strike without first exhausting the applicable RLA procedures." App. 24a.

REASONS FOR GRANTING THE WRIT

This case raises a complex, sensitive and emotion-charged issue that has haunted American labor law throughout this century: whether the federal courts' equity powers should be directed against concerted refusals to work by employees that do not arise out of a dispute with their immediate employer but out of a refusal to cross a picket line set up by another group of organized employees in the latter's effort to obtain a new collective bargaining agreement.

This issue goes to the heart of a labor relations system which does not provide for governmental resolution

of intractable collective bargaining disputes but for a resolution achieved by permitting the " 'full range of whatever peaceful economic power [the parties] can muster.' " *TWA v. IFFA*, 109 S.Ct. 1225, 1235 (1989) (quoting *Railroad Trainmen v. Terminal Co.*, 394 U.S. 369, 392 (1969) (*"Jacksonville Terminal Co."*)). Particularly where the primary employer exercises his self-help right to operate in the face of a strike, *see TWA v. IFFA*, 109 S.Ct. at 1235, the strikers' self-help right to secure the aid and assistance of other organized employees in the form of sympathetic refusal to work becomes the critical factor in determining the outcome. Injunctive orders against such sympathy strikes thus decisively tip the balance in favor of the primary employer and in that way undermine not only the fairness of the Railway Labor Act system for settling collective bargaining disputes but also its effectiveness. *See Burlington Northern v. Maintenance Employes*, 481 U.S. 429, 451-52 (1987) ("the availability of such self-help measures as secondary picketing may increase the effectiveness of the RLA in settling major disputes by creating an incentive for the parties to settle prior to exhaustion of the statutory procedures").

The court of appeals held, in essence, that where the Railway Labor Act applies, sympathy strikes are to be enjoined whenever the pertinent collective bargaining agreement is "susceptible to being read" as a ban on such strikes. App. 25a-26a. That court made it plain, moreover, that even where, as here, "none of the pertinent collective bargaining agreements contained 'no strike' clauses or provisions expressly permitting or prohibiting the honoring of picket lines," App. 18a, but only " 'a variety of affirmative obligations of the employer and the union employees involved, which *assume* a regular ongoing working relationship' ", App. 25a (emphasis added), the agreements are susceptible to such a reading.[1] Given

[1] The court of appeals noted that of the approximately 80 collective bargaining agreements at issue only two may be read to

the nature of RLA collective bargaining agreements, of which the agreements here are a fair sample, the decision below is, in everything but name, an across-the-board proscription of sympathy strikes in the railroad and airline industries.

Under *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921) and its progeny, labor injunctions against secondary activity generally and sympathy strikes in particular were routinely available.[2] Such injunctions issued without regard to the comparative equities of the primary employer and the primary employees and without any recognition of the reality that an "injunction does not settle a dispute—it simply disables one of the parties," *Burlington Northern*, 481 U.S. at 451.

The 1932 Norris-LaGuardia Act was, of course, Congress' direct response to *Duplex Printing*. *See Burlington Northern*, 481 U.S. at 438. Congress' purpose there was to "disapprov[e] . . . these free-wheeling judicial exercises," *Jacksonville Terminal Co.*, 394 U.S. at 382-83, and to bring the era of government by labor injunction to an end. "[T]he railroads were to be treated no differently from other industries in this regard." *Burlington Northern*, 481 U.S. at 440.

Very simply stated, the decision below, both in result and reasoning, is a return to the *Duplex Printing* regime. That decision, just as effectively as its predecessor, all but assures that employers faced with a sympathy strike will be able to put the federal courts' equity powers on

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contain a "no strike" clause, but added that "this does not materially alter the overall situation." App. 18a n.2.

[2] "In *Duplex*, the employees' primary dispute was with a manufacturer of printing presses in Battle Creek, Michigan. Because a strike by only the employees of the manufacturer was unlikely to succeed, the international union representing the employees expanded the strike to those employees who transported, installed and served the presses. The Court held that Congress did not intend § 20 [of the Clayton Act] to protect such an expansion." *Burlington Northern*, 481 U.S. at 438.

their side. That decision, like its predecessor, finds sanction for its result in a Congressional enactment—here the Railway Labor Act, there § 20 of the Clayton Act—through a process that can only be characterized as "statutory misconstruction". *Jacksonville Terminal Co.*, 394 U.S. at 382. And the decision below, like its predecessor, rests on a "general intuition about the political and economic significance of secondary picketing," *Burlington Northern*, 481 U.S. at 438: the intuition that secondary activity is intolerable as a threat of " 'general class war' ", *id.* (quoting *Duplex Printing*, 254 U.S. at 472).

Having shown that much, we believe we have shown enough to warrant—indeed, to mandate—the granting of this *certiorari* petition. The right to seek—and to *obtain* —the assistance of other organized employees is a potent self-help weapon in the arsenal of employees engaged in a collective bargaining dispute with their employer. The question whether the Railway Labor Act authorizes the issuance of federal court injunctions that neutralize that weapon—and by so doing greatly increase the power of management and diminish the power of labor—is thus a question of the first magnitude. That question is an open one in this Court. It is therefore patent that this Court —and not a court of appeals—should provide the answer. And that is not the whole of the matter.

As the court below acknowledged, there is a circuit conflict on whether the federal courts have authority to enjoin Railway Labor Act sympathy strikes.

The court below, moreover, premised its theory that the courts can, in particular, enjoin RLA sympathy strikes alleged to be in breach of contract on the broader theory that the federal courts can, in general, issue a status quo injunction in any RLA "minor dispute," *i.e.*, any dispute concerning an action taken by management or by labor that is alleged to constitute a breach of a governing collective bargaining agreement. On this proposition, as on its corollary, the court of appeals law is in

disarray. The First and D.C. Circuits take the view that the federal courts have no authority to issue RLA minor dispute status quo injunctions. The Second, Fifth and Eighth Circuits, by contrast, take the view that the courts have such authority where the alleged contract breach threatens irreparable injury.

Of at least equal importance, the decision below leaves this Court's *Burlington Northern* decision a "derelict on the waters of the law," *Lambert v. California*, 355 U.S. 225, 232 (1957) (Frankfurter, J., dissenting). Just over two years ago, this Court *unanimously* held: "In the Norris-LaGuardia Act, Congress divested federal courts of the power to enjoin secondary picketing in railway labor disputes." 481 U.S. at 453. Nonetheless the court of appeals, while noting that " 'without the expectation that picket lines would be honored, picketing is of little practical effect' ", App. 27a (quoting *Western Maryland Railroad v. System Board of Adjustment*, 465 F. Supp. 963, 975 (D. Md. 1979)), and after recognizing "that it is somewhat anomalous that secondary picketing is allowed by *Burlington Northern*, but considerably undercut in its effectiveness by the type of injunction entered here", App. 27a, proceeded to "undercut" this Court's *Burlington Northern* decision in just that anomalous way.

The court of appeals did so even though that court could *not* point to a decision of this Court requiring that result but only to its own far from self-evident reading of RLA § 2 First. We submit that the courts of appeals are not free, in divining the answers to open legal questions, to show such a cavalier disregard for this Court's precedents.

1(a). The court of appeals candidly recognized that there is a circuit conflict as to whether the RLA's "minor dispute" provisions—which mandate the arbitration of disputes over whether there has been a breach of a collective bargaining agreement—empower the federal courts to enjoin sympathy strikes alleged to be in breach of contract. That court's succinct articulation of the state of

the lower court law fairly summarizes the conflicting decisions:

> The Unions contend . . . that the sympathy strike which they propose is not a 'dispute' between the Unions and the Railroads, and therefore is not subject to the resolution procedures of the RLA. Their claim is not without case support. *See Eastern Air Lines, Inc. v. Air Line Pilots Ass'n, Int'l*, No. 89-5229 (11th Cir. March 24, 1989) ('[o]rdinarily, it is lawful to honor picket lines, and the RLA does not unambiguously preclude sympathy strikes')[3]; *Brotherhood of Locomotive Firemen & Enginemen v. Florida East Coast Ry. Co.*, 346 F.2d 673, 675-76 (5th Cir. 1965) (sympathy strike treated as part of provoking major dispute which had reached stage of permissible self-help); *Arthur v. United Air Lines, Inc.*, 655 F.Supp. 363, 367 (D. Colo. 1987) (unlawful under RLA to terminate non-union employees who sympathy strike absent evidence that terminations necessary to prevent disruption of vital transportation services); *Western Maryland R.R. Co. v. System Bd. of Adjustment*, 465 F.Supp. 963, 975 (D. Md. 1979) (sympathy strike not enjoinable under RLA); *Northwest Airlines, Inc. v. Transport Workers Union*, 190 F.Supp. 495, 498 (W.D. Wash. 1961) (sympathy strike treated as aspect of another union's major dispute).
>
> Other courts, however, have held that a sympathy strike presents a dispute subject to RLA resolution procedures, and is accordingly enjoinable. *See Trans Int'l Airlines, Inc. v. International Bhd. of Teamsters*, 650 F.2d 949 (9th Cir. 1980) (sympathy strike by employees subject to 'no strike' clause enjoined under RLA pending determination of contractual rights pursuant to minor dispute resolution procedures), *cert. denied*, 449 U.S. 1110, 101 S.Ct. 918, 66 L.Ed.2d 839 (1981); *Northwest Airlines, Inc. v.*

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[3] The Eleventh Circuit's opinion in *Eastern Air Lines v. Air Line Pilots Association, International*, No. 89-5229 (11th Cir. Mar. 24, 1989), is reprinted at App. 93a-95a.

> *Air Line Pilots Ass'n, Int'l*, 442 F.2d 246 (8th Cir. 1970), *aff'd on rehearing*, 442 F.2d 251 (8th Cir.) (sympathy strike enjoinable under minor dispute resolution procedures of RLA notwithstanding absence of 'no strike' clause, because contract may arguably be interpreted as implicitly prohibiting honoring of picket lines), *cert. denied*, 404 U.S. 871, 92 S.Ct. 70, 30 L.Ed.2d 116 (1971); *Chicago & Illinois Midland Ry. Co. v. Brotherhood of R.R. Trainmen*, 315 F.2d 771 (7th Cir.) (sympathy strike enjoinable where no effort made to comply with minor dispute resolution procedures of RLA), *vacated as moot*, 375 U.S. 18, 84 S.Ct. 61, 11 L.Ed.2d 39 (1963); *Northwest Airlines, Inc. v. International Association of Machinists*, —— F.Supp. —— (D.Minn. 1989) (sympathy strike enjoinable under RLA where collective bargaining agreement includes 'no strike' clause); *International Ass'n of Machinists v. Airline Indus. Relations Conf.*, Civ. 89-0514 (D.D.C. March 16, 1989) (same); *Southeastern Pa. Transp. Auth. v. International Ass'n of Machinists*, 708 F.Supp. 659 (E.D. Pa. 1989) (same); *Trans World Airlines v. International Ass'n of Machinists*, 629 F.Supp. 1554 (W.D. Mo. 1986) (same). [App. 22a-24a]

To make the foregoing complete, we add that the Third Circuit subsequently aligned itself with the court below by affirming the *Southeastern Pa. Transp. Auth.* district court decision cited above. *See Southeastern Pennsylvania Transportation Authority v. International Association of Machinists and Aerospace Workers*, 1989 U.S. App. LEXIS 11990, No. 89-1174 (3d Cir. Aug. 14, 1989).

In sum, the RLA law in the Eleventh and Fifth Circuits—like the National Labor Relations Act law declared by this Court in *Buffalo Forge v. Steelworkers*, 428 U.S. 397 (1976)—is that nothing in the applicable federal collective bargaining statutes overrides the Norris-LaGuardia Act and that the federal courts therefore do not have the authority to enjoin sympathy strikes alleged to be in breach of contract. The RLA law in the Second Circuit—

and in the courts of appeals aligned with the court below —is that "the major purpose of the passage of the RLA was to prevent strikes in the transportation industries subject to its governance," App. 26a, and that this asserted RLA purpose overrides Norris-LaGuardia and justifies the federal court injunctions issued here.

(b). The court of appeals sought to buttress its side of this circuit conflict by suggesting that the decision below flows *a fortiori* from this Court's decision in *Trainmen v. Chicago R. & I. R. Co.*, 353 U.S. 30 (1957) (*"Chicago River"*). App. 22a. The question decided in *Chicago River* is, however, entirely separate from the question presented here.

Chicago River addressed the lawfulness of a strike in response to carrier action where *that carrier action* is alleged to be in breach of the applicable collective bargaining agreement. Without submitting the contract dispute to RLA arbitration—where an expert arbitrator would determine whether the carrier's action was consistent with the contract—the union in *Chicago River* sought to get its way by resorting to economic self-help to pressure the carrier to accept the union's contract interpretation. An exception to the Norris-LaGuardia Act was warranted, the *Chicago River* Court reasoned, because by virtue of the mandatory arbitration provisions of the RLA "[s]uch controversies . . . are not the same as those in which the injunction strips labor of its primary weapon without substituting any reasonable alternative." 353 U.S. at 41.

In this case, by contrast, it is the *unions* that stand in the position of the *Chicago River* employer. The unions are alleged to be acting in violation of their contractual obligation to report to work and it is the carriers who are seeking to get their way without demonstrating to an arbitrator's satisfaction that the unions' action does in fact violate the contract. And in this case, unlike *Chicago River*, the injunction clearly does "strip[] labor of its

primary weapon without substituting any reasonable alternative."

In short, the availability of an RLA status quo injunction directed against an alleged breach of contract pending arbitration of the contract claim was not an issue presented in *Chicago River* and has never been addressed by this Court. Thus, whatever the governing rule in this case is determined to be, that rule will not be derived by implication from *Chicago River*. *Cf. Buffalo Forge*, 428 U.S. at 404-11 (distinguishing, for purposes of the National Labor Relations Act, strikes over an arbitrable dispute and sympathy strikes which have "neither the purpose nor the effect of denying or evading an obligation to arbitrate," *id.* at 408).

2. The court of appeals treated it as too plain for doubt that if the collective bargaining agreements were "reasonably susceptible" to the railroads' interpretation, the federal courts have authority to enter the requested injunctions. After reviewing the district court's basis for concluding that the railroads have a colorable breach of contract claim, App. 25a-26a, the court of appeals stated: "We agree. Consequently, the disputes are arbitrable and the preliminary injunctions were properly entered." App. 26a.[4] The Fifth and Eighth Circuits take essentially the same position. *International Association of Machinists and Aerospace Workers v. Frontier Airlines*, 664 F.2d 538, 542 (5th Cir. 1981) ("injunctions may issue to prevent the carrier from disrupting the status quo when doing so would result in irreparable injury"); *United Transportation Union v. Burlington Northern, Inc.*, 458 F.2d 354, 357 (8th Cir. 1972) (a

[4] *See also International Association of Machinists and Aerospace Workers v. Eastern Air Lines*, 847 F.2d 1014, 1017 (2d Cir. 1988) (affirming minor dispute status quo injunction); *Westchester Lodge 2186 v. Railway Express Agency, Inc.*, 329 F.2d 748, 753 (2d Cir. 1964) (federal court can issue injunction "to restore the *status quo* in a minor dispute if the court's discretion is soundly exercised to preserve the primary jurisdiction of the Adjustment Board").

breach of contract injunction may issue "upon an equitable showing of irreparable injury").

The District of Columbia and First Circuits reject the positions of the foregoing courts. As the D.C. Circuit stated in terms that could not be clearer: "the arbitration board's jurisdiction over minor disputes is exclusive; *the courts do not have jurisdiction to issue status quo injunctions.*" *Air Line Pilots Association, International v. Eastern Air Lines*, 863 F.2d 891, 895-96 (D.C. Cir. 1988) (emphasis added). *Accord International Association of Machinists and Aerospace Workers v. Eastern Air Lines*, 826 F.2d 1141 (1st Cir. 1987).[5]

Just last term the Court "decline[d] to resolve the question whether a status quo injunction based on a claim of irreparable injury would be appropriate" in a minor dispute because the union in that case did not base "its claim for injunctive relief on an allegation of irreparable injury". *Consolidated Rail Corp. v. Railway Labor Executives' Association*, 109 S.Ct. 2477, 2481 & n.5 (1989). *See also Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas Railroad*, 363 U.S. 528, 531 n.3 (1960) (also declining to reach this question).

The longstanding conflict in the courts of appeals on this important issue, like the conflict detailed in point one above, requires this Court's consideration and resolution.[6]

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[5] The state of the lower court law is so confused that the First Circuit claimed to find support for its view in decisions of the Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh and D.C. Circuits, all of which, the First Circuit said, had "rejected" the Second Circuit's view. *See IAM v. Eastern Air Lines*, 826 F.2d at 1151 (collecting cases).

For present purposes it suffices to say that the Second Circuit position, on the one hand, and the D.C. Circuit and First Circuit position, on the other, cannot be reconciled.

[6] As a matter of pure logic, the sympathy strike injunction question discussed in point one is a particular instance of the RLA minor dispute status quo injunction question discussed in point

3. We began by stating that the court of appeals' decision is based on the same "self-mesmerized views of economic and social theory", *Jacksonville Terminal Co.*, 394 U.S. at 382, that generated the *Duplex Printing* decision. We conclude by returning to that point. The parallel is most clearly evident in the court of appeals' irreparable injury discussion. *See* App. 29a-30a. So far as the court below could see, the only employee interest at stake here is that of the petitioner rail unions in "expressing solidarity with another union by honoring its picket line." App. 29a.[7] Given its blindness, the court "[saw] no reason why a union should be accorded greater rights to engage in a sympathy strike to apply pressure against *another* employer than it has to engage in a primary strike against the employer of its own members." App. 28a (emphasis in original).

The facile equation of this case with a *Chicago River* case totally ignores the true interests at stake. Under *Chicago River* the injunction against self-help is both in form and *in substance* directed at a party to a contract who has no right to engage in self-help over a contract interpretation dispute (and who does have a right to an

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two in the sense that a negative answer to the latter question entails a negative answer to the former.

We distinguish between these two questions because the court below framed—and analyzed—the question here as a strike injunction question and we do not wish to open ourselves to the counter argument that we have mischaracterized the court of appeals' position or have failed to meet that court on its chosen ground. Moreover, it is far from clear that all the lower courts equate employer requests for status quo injunctions against sympathy strikes with union requests for status quo injunctions against alleged employer contract breaches.

[7] It is instructive to compare the court of appeals' summary dismissal of the critical employee interests in honoring picket lines with Judge Hand's thoughtful explication of those same employee interests in *NLRB v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d 503, 505-06 (2d Cir. 1942) (L. Hand, J.).

arbitral resolution of his breach of contract claim). Here, by contrast, while in form the injunction is against the petitioner unions, which are parties to collective bargaining agreements with the respondent railroads, in substance the injunction is against *the employees of Eastern Air Lines represented by the IAM*, who have exhausted the Railway Labor Act collective bargaining procedures and who have a right to engage in meaningful self-help.

The court of appeals does not even acknowledge the Eastern employees' rights and interests. Not surprisingly, then, its decision substitutes for the RLA's guarantee to those employees of the full-blooded right to picket, as that right has traditionally been understood, an enfeebled "right" to publicize a labor dispute to members of the general traveling public. *See* App. 27a n.4.

In this regard the decision below cannot be squared with this Court's *Burlington Northern* and *TWA v. IFFA* decisions. As the Court emphasized in the latter case, the RLA provides "greater avenues of self-help" to primary disputants than does the NLRA. 109 S.Ct. at 1233. Among these, as *Burlington Northern* held, is the right of employees engaged in a primary collective bargaining dispute to take part in secondary self-help activity that means something, *i.e.*, secondary activity generating economic pressure that "creat[es] an incentive for the [primary] parties to settle." 481 U.S. at 451-52.

The court of appeals compounded this error by treating this case as one in which it is sufficient for the party alleging a contract breach to show that the applicable collective bargaining agreement is reasonably susceptible to being read as a waiver of the covered employees' right to honor a lawful picket line. *See* App. 25a-26a. *Compare Consolidated Rail Corp. v. Railway Labor Executives' Association*, 109 S.Ct. at 2482. In the Railway Labor Act context, as in the National Labor Relations

Act context, the proper rule is that a contractual waiver of this basic statutory right "must be clear and unmistakable," *Local Union 1395, IBEW v. NLRB*, 797 F.2d 1027, 1029 (D.C. Cir. 1986) (*quoting Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983)).

Under the court of appeals' approach, as we have shown, the RLA's minor dispute procedures become the means for undermining the Act's major dispute procedures. The clear and unmistakable waiver rule, in contrast, prevents employers from manipulating the minor dispute procedures to frustrate the right of employees engaged in a major dispute to employ the "full range of whatever peaceful economic power [those employees] can muster," *TWA v. IFFA*, 109 S.Ct. 1235 (*quoting Jacksonville Terminal Co.*, 394 U.S. at 392).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 1093, 1104, 1105, 1106—August Term 1988

(Argued: March 28, 1989 Decided: April 10, 1989)

Docket Nos. 89-7297, 89-7299, 89-7301, 89-7303

THE LONG ISLAND RAILROAD COMPANY,
Plaintiff-Appellees,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS; THOMAS LAVECCHIA, INDIVIDUALLY AND AS LOCAL CHAIRMAN OF IAM; BROTHERHOOD OF LOCOMOTIVE ENGINEERS; JOSEPH A. CASSIDY, JR., INDIVIDUALLY AND AS GENERAL CHAIRMAN OF BLE; BROTHERHOOD OF RAILROAD SIGNALMEN; ROBERT A. WAIDLER, INDIVIDUALLY AND AS GENERAL CHAIRMAN OF BRS; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; JOHN A. CAGGIANO, INDIVIDUALLY AND AS BUSINESS MANAGER OF IBEW; INTERNATIONAL BROTHERHOOD OF FIREMEN & OILERS; PHILIP A. MAZZOLA, INDIVIDUALLY AND AS GENERAL CHAIRMAN OF IBF&O; NATIONAL TRANSPORTATION SUPERVISORS ASSOCIATION; THOMAS T. ROGERS, INDIVIDUALLY AND AS GENERAL CHAIRMAN & PRESIDENT OF NTSA; SHEET METAL WORKERS INTERNATIONAL ASSOCIATION; GREGORY WENCHELL, INDIVIDUALLY AND AS LOCAL CHAIRMAN OF SMWIA; TRANSPORTATION COMMUNICATIONS UNION; EDWARD A. HANLEY, JR., INDIVIDUALLY AND AS GENERAL CHAIRMAN OF TCU; TCU-AMERICAN RAILWAY SUPERVISORS ASSOCIATION; ANTHONY M. ORIOLES, INDIVIDUALLY AND AS GENERAL CHAIRMAN OF TCU-ARSA; UNITED TRANSPORTATION UNION; EDWARD YULE, JR., INDIVIDUALLY AND AS GEN-

ERAL CHAIRMAN OF UTU; UTU-YARDMASTERS DEPARTMENT; P. TRAMONTANO, INDIVIDUALLY AND AS GENERAL CHAIRMAN OF UTU-YARDMASTERS DEPT.,
Defendants-Appellants.

METRO-NORTH COMMUTER RAILROAD COMPANY,
Plaintiff-Appellee,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS ("IAM"), W.F. MITCHELL, INDIVIDUALLY AND AS GENERAL CHAIRMAN OF THE IAM, AMERICAN RAILWAY SUPERVISORS ASSOCIATION ("ARSA"), JAMES D. KELLY, INDIVIDUALLY AND AS GENERAL CHAIRMAN OF ARSA, DONALD L. REYNOLDS, INDIVIDUALLY AND AS GENERAL CHAIRMAN OF ARSA, AMERICAN TRAIN DISPATCHERS ASSOCIATION ("ATDA") REPRESENTING TRAIN DISPATCHERS AND POWER SUPERVISORS, T.J. RINGWOOD, INDIVIDUALLY AND AS GENERAL CHAIRMAN OF THE ATDA, JOHN KROLL, INDIVIDUALLY AND AS GENERAL CHAIRMAN OF THE ATDA, BROTHERHOOD OF RAILROAD SIGNALMEN ("BRS"), R.E. MCKENZIE, INDIVIDUALLY AND AS GENERAL CHAIRMAN OF THE BRS, BROTHERHOOD OF LOCOMOTIVE ENGINEERS ("BLE"), R.W. GODWIN, INDIVIDUALLY AND AS GENERAL CHARIMAN OF THE BLE, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS ("IBEW"), REPRESENTING ELECTRICIANS, COMMUNICATION WORKERS AND ELECTRIC TRACTION WORKERS, PETER A. PUGLIA, INDIVIDUALLY AND AS GENERAL CHAIRMAN OF THE IBEW, LOCAL 495, HOTEL & RESTAURANT EMPLOYEES BARTENDERS INTERNATIONAL UNION, DELENOW BROADUS, INDIVIDUALLY AND AS GENERAL CHAIRMAN OF LOCAL 495, INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS ("IBB"), GARY CALIENDO, INDIVIDUALLY AND AS LOCAL CHAIRMAN OF IBB, INTERNATIONL BROTHERHOOD OF FIREMEN & OILERS ("IBF&O"), GEORGE FRANCISCO, JR., INDIVIDUALLY AND AS GENERAL CHAIRMAN &

INTERNATIONAL VICE PRESIDENT OF THE IBF&O, LOCAL 808, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, NICK DELICIO, INDIVIDUALLY AND AS PRESIDENT OF LOCAL 808, SHEETMETAL WORKERS INTERNATIONAL ASSOCIATION ("SHEETMETAL WORKERS"), CARLTON J. WELSCH, INDIVIDUALLY AND AS GENERAL CHAIRMAN OF THE SHEETMETAL WORKERS, TRANSPORT WORKERS UNION OF AMERICA ("TWU"), TIMOTHY GRANDFIELD, INDIVIDUALLY AND AS INTERNATIONAL PRESIDENT OF TWU, LOCAL 1460, TRANSPORT WORKERS UNION, J.M. MCGRATH, INDIVIDUALLY AND AS PRESIDENT OF LOCAL 1460, TRANSPORTATION COMMUNICATION INTERNATIONAL UNION ("TCIU"), HOWARD W. RANDOLPH, JR., INDIVIDUALLY AND AS GENERAL CHAIRMAN OF THE TCIU, TRANSPORTATION COMMUNICATION INTERNATIONAL UNION ("TCIU") TC DIVISION, R.H. BARNARD, INDIVIDUALLY AND AS VICE GENERAL CHAIRMAN OF THE TCIU, UNITED TRANSPORTATION UNION ("UTU") REPRESENTING CONDUCTORS & TRAINMEN, ENGINEERS AND YARDMASTERS, JAMES D. PHELAN, INDIVIDUALLY AND AS GENERAL CHAIRMAN OF THE UTU, W.A. WODOWSKI, INDIVIDUALLY AND AS GENERAL CHAIRMAN OF THE UTU, P.G. TRAMONTANO, INDIVIDUALLY AND AS GENERAL CHAIRMAN OF THE UTU, AND ALL OTHERS ACTING IN CONCERT WITH THE ARSA, ATDA, BRS, BLE, IBEW, LOCAL 495, IBB, IBF&O, LOCAL 808, PBA, SHEETMETAL WORKERS, TWU, LOCAL 1460, TCIU, TCIU-TC DIVISION AND THE UTU,

Defendants-Appellants.

NJ TRANSIT RAIL OPERATIONS, INC., AN INSTRUMENTALITY OF THE STATE OF NEW JERSEY,

Plaintiff-Appellee,

v.

THE BROTHERHOOD OF RAILROAD SIGNALMEN, AN UNINCORPORATED ASSOCIATION, AND ROLAND E. MCKENZIE, INDIVIDUALLY AND AS GENERAL CHAIRMAN OF THE BROTHERHOOD; THE AMERICAN TRAIN DISPATCHERS

ASS'N, AN UNINCORPORATED ASSOCIATION, AND S.S. SHERMAN AND GEORGE BURKE, INDIVIDUALLY AND AS GENERAL CHAIRMEN OF THE ASSOCIATION; THE INTERNATIONAL BROTHERHOOD OF FIREMEN AND OILERS, SYSTEM COUNCIL NO. 2, AN UNINCORPORATED ASSOCIATION, AND GEORGE J. FRANCISCO, INDIVIDUALLY AND AS GENERAL CHAIRMAN OF THE BROTHERHOOD; THE BROTHERHOOD RAILWAY CARMEN, A DIVISION OF TCU, AN UNINCORPORATED ASSOCIATION, AND JAMES PARRY, INDIVIDUALLY AND AS GENERAL CHAIRMAN OF THE BROTHERHOOD; THE BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, AN UNINCORPORATED ASSOCIATION, AND LEONARD ALLEN, INDIVIDUALLY AND AS GENERAL CHAIRMAN OF THE BROTHERHOOD; THE INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AN UNINCORPORATED ASSOCIATION, AND CHARLES C. ARTHUR, JR., INDIVIDUALLY AND AS GENERAL CHAIRMAN OF THE ASSOCIATION; THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AN UNINCORPORATED ASSOCIATION, AND P.A. PUGLIA, INDIVIDUALLY AND AS GENERAL CHAIRMAN OF THE BROTHERHOOD; THE TRANSPORT WORKERS UNION, AN UNINCORPORATED ASSOCIATION, AND TOM MCADAM, INDIVIDUALLY AND AS GENERAL CHAIRMAN OF THE UNION; THE TRANSPORTATION COMMUNICATION INTERNATIONAL UNION, AN UNINCORPORATED ASSOCIATION, AND HOWARD W. RANDOLPH, JR., INDIVIDUALLY AND AS GENERAL CHAIRMAN OF THE UNION; THE INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRONSHIP BUILDERS, BLACKSMITHS, FORGERS & HELPERS, AN UNINCORPORATED ASSOCIATION, AND ALAN M. SCHEER, INDIVIDUALLY AND AS GENERAL CHAIRMAN OF THE BROTHERHOOD; THE BROTHERHOOD OF LOCOMOTIVE ENGINEERS, AN UNINCORPORATED ASSOCIATION, AND D.T. ABBOTT, INDIVIDUALLY AND AS GENERAL CHAIRMAN OF THE BROTHERHOOD;

Defendants-Appellants.

NATIONAL RAILROAD PASSENGER CORPORATION,
400 N. Capitol Street, N.W., Washington, D.C. 20001,
Plaintiff-Appellee,

v.

AMERICAN RAILWAY & AIRWAY SUPERVISORS ASSOCIATION,
3 Research Place, Rockville, MD 20850

and

F. FERLIN, JR., President, AMERICAN RAILWAY AND AIRWAY SUPERVISORS ASSOCIATION, 3 Research Place, Rockville, MD 20850

and

A.A. D'ALLESANDRO, System General Chairman, AMERICAN RAILWAY AND AIRWAY SUPERVISORS ASSOCIATION, 2477-B Napfle, Philadelphia, PA 19152

and

J.N. FOUNTAIN, President and General Chairman, (OBS)-Lodge 5093, AMERICAN RAILWAY AND AIRWAY SUPERVISORS ASSOCIATION, 641 West Elder Street, Fallbrook, CA 92028,

and

E.J. GUTOWSKI, General Chairman (MW), AMERICAN RAILWAY AND AIRWAY SUPERVISORS ASSOCIATION, 1946 Stanhope Road, Baltimore, MD 21222,

and

SHERMAN E. JENNINGS, Vice President and Vice General Chairman, ARASA Lodge 5093, AMERICAN RAILWAY AND AIRWAY SUPERVISORS ASSOCIATION, 9209 South State Street, Chicago, IL 60619,

and

AMTRAK SERVICE WORKERS COUNCIL,
3 Research Place, Rockville, Maryland 20850,

and

J.M. PARKER, Chairman, AMTRAK SERVICE WORKERS COUNCIL, 3 Research Place, Rockville, MD 20850,

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and

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and

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and

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J.J. DAVISON, General Chairman, BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, 450 Chauncy Street, Mansfield, MA 02048,

and

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and

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and

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J.L. ROY, Assistant to President, Director, RAILROAD YARDMASTERS OF AMERICA, 14600 Detroit Avenue, Cleveland, OH 44107,

and

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION,
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and

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and

D.C. BUCHANAN, Director of Railroads, SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, 1750 New York Avenue, N.W., Washington, D.C. 20006,

and

C.J. WELCH, General Chairman, SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, 11 Leonard Street, Mansfield, MA 01048,

and

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and

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and

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and

W.A. BEEBE, General Chairman, UNITED TRANSPORTATION UNION, 47 College Plaza, Room 227, New Haven, CT 06510,

and

C.P. JONES, General Chairman, UNITED TRANSPORTATION UNION, Three Penn Center Plaza, Suite 1422, Philadelphia, PA 19102,

and

S.F.A. MCGREGOR (Stewards), General Chairman, UNITED TRANSPORTATION UNION, 5035 South Drexel, Townhouse M, Chicago, IL 60615,

and

LARRY J. WOTASZAK, Vice President, UNITED TRANSPORTATION UNION, 105 Danor Court (Chesterbrook), Wayne, PA 19087,

Defendants-Appellants.

Before:

OAKES, KEARSE and MAHONEY,

Circuit Judges.

Appeal by unions and union officers representing employees of railroads from an order granting preliminary injunctions restraining the unions and union officers from striking in sympathy with a union engaged in a lawful strike against an air carrier.

Modified and, as modified, affirmed.

JOSEPH GUERRIERI, JR., Washington, D.C. (Richard Ruda, Samuel Issachoroff, Michael G. Dzialo, Guerrieri Edmond & James, Washington, D.C.; Sheldon Engelhard, Barbara J. Olshansky, Valerie Marcus, Hannon Kolko, Vladeck, Waldman, Elias & Engelhard, P.C., Washington, D.C.; Laurence Gold, AFL-CIO, Washington, D.C.; Allison Beck, Associate General Counsel, International Association of Machinists and Aerospace Workers, Washington, D.C.; Roland P. Wilder, Jr., Baptiste & Wilder, Washington, D.C., of counsel), *for Defendants-Appellants.*

BERNARD M. PLUM, New York, New York (Joseph Baumgarten, Neil H. Abramson, Proskauer Rose Goetz & Mendelsohn, New York, New York, of counsel), *for Plaintiffs-Appellees The Long Island Rail Road Company and Metro-North Commuter Railroad Company.*

SALLY D. GARR, Associate General Counsel, National Railroad Passenger Corporation, Washington, D.C. (William G. Ballaine, Siff, Rosen & Parker, P.C., New York, New York; Morgan, Lewis & Bockius, Washington, D.C., of counsel), *for Plaintiff-Appellee National Railroad Passenger Corporation.*

PETER N. PERRETTI, JR., Attorney General of New Jersey, Newark, New Jersey (Robert H. Stoloff, Assistant Attorney General, David S. Griffiths, Deputy Attorney General, Newark, New Jersey, of counsel), *for Plaintiff-Appellee NJ Transit Rail Operations, Inc.*

MAHONEY, *Circuit Judge*:

Four railroads, The Long Island Railroad Company ("L.I.R.R."), Metro-North Commuter Railroad Company ("Metro-North"), NJ Transit Rail Operations, Inc. ("NJ Transit") and National Railroad Passenger Corporation ("Amtrak") (collectively the "Railroads") commenced separate actions in the United States District Court for the Southern District of New York against the Inter-

national Association of Machinists and Aerospace Workers ("IAM") and various of its officers, together with numerous other unions named in the caption and various of their officers (collectively, sometimes including the IAM and its named officers, the "Unions"). The Unions, including IAM, represent employees of the Railroads. The IAM is on strike against Eastern Air Lines, Inc. ("Eastern"), and had expressed an intention to picket the Railroads. These actions seek injunctive relief requiring the Unions not to honor picket lines established by the IAM at the Railroads.

This appeal is taken from preliminary injunctions entered in the United States District Court for the Southern District of New York, Robert P. Patterson, Jr., *Judge*, which restrain the Unions, "their officers, agents, representatives and the employees represented by them, and all those in active concert or participation with them who receive notice of this [injunction]," from participating in "any . . . interruption in the operation of [L.I.R.R., Metro-North or NJ Transit] by and among any of [their] employees," or in the case of Amtrak, from participating in "conceretd labor activity disruptive of Amtrak's normal rail operations." All of the preliminary injunctions provided that they were not to be construed to inhibit secondary picketing and other lawful strike activities by members of the IAM who are not employees of the Railroads.

We have jurisdiction of this interlocutory appeal pursuant to 28 U.S.C. § 1292(a)(1) (1982). A motion to expedite the appeal has previously been granted, *see* 29 U.S.C. § 110 (1982 & Supp. IV 1986), a motion to allow memoranda in excess of ten pages in support of a motion for stay pending appeal was implicitly granted by acceptance of the memoranda for filing, and a motion for consolidation of the appeals is hereby granted.

We modify the preliminary injunctions as hereinafter specified with respect to their impact upon individual

employees represented by the Unions, and affirm the orders granting the preliminary injunctions, as modified. We deny the Unions' motion for a stay of said orders pending appeal.

Background

On March 4, 1989, the IAM commenced a lawful strike against Eastern after exhausting without settlement the pertinent procedures mandated by the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151-188 (1982), for negotiating changes in their collective bargaining agreement.[1] On February 2, 1989, the IAM informed the National Mediation Board of its general plans to engage in secondary picketing in the air, rail and manufacturing industries in connection with any strike against Eastern, and expressed at the outset of the Eastern strike its specific intention to picket the Railroads commencing Monday, March 6, 1989. The IAM actively sought support from the Unions in urging, encouraging and instructing their members to honor the IAM picket lines. The Unions stipulated in hearings below that if IAM picket lines are established at the Railroads, the Unions will encourage union members to honor them; that if the Unions encourage their members to honor the picket lines, the members are unlikely to cross them; and that if the employees do not cross the picket lines, the Railroads will be forced

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[1] The IAM and Eastern had been negotiating changes in their collective bargaining agreement since November, 1987. On February 1, 1989, the National Mediation Board released the parties from mediation after declaring the negotiations to be at an impasse. Eastern rejected an offer of binding arbitration made by the Board pursuant to 45 U.S.C. § 155 First (1982). On February 24, 1989, the Board recommended to the President of the United States that he appoint an emergency board pursuant to 45 U.S.C. § 160 (1982) because the IAM-Eastern dispute "threaten[s] substantially to interrupt interstate commerce." *Id.* On March 3, 1989, the President indicated his intention not to appoint an emergency board. On March 4, 1989, following expiration of the thirty-day "cooling off" period mandated by 45 U.S.C. § 155 First (1982), the IAM struck Eastern.

to cease operations. The evidence established that members of at least some of the Unions who disobeyed Union directives to honor picket lines would be subject to discipline through imposition of fines and expulsion from Union membership. Some Union representatives also intimated that injury to person and property could result from crossing picket lines set up by the IAM.

Evidence was also presented below that since most of the Unions represent employees of all four Railroads, and Amtrak interconnects and shares facilities with all of the other Railroads, the refusal of one union to cross IAM picket lines against any one of the Railroads could, in all probability, cause all of the Railroads to cease operations. Moreover, because of the operational interrelationship between Amtrak's intercity service and local commuter services, a refusal to cross IAM picket lines by any Union would likely prevent all passenger rail traffic from moving between cities in the northeast, and to some extent elsewhere.

On March 4, 1989, the L.I.R.R., Metro-North and NJ Transit moved for a temporary restraining order enjoining the Unions representing their employees from honoring the threatened IAM picket lines. On March 5, 1989, the district court held a six-hour hearing and issued temporary restraining orders granting the requested relief. On March 6, 1989, the court conducted a hearing and issued a temporary restraining order on a similar application by Amtrak.

A motion to the district court by the Unions to stay the orders pending appeal was denied. An appeal was then taken to this court, and the Unions promptly moved for expedited consideration of their emergency appeal, a stay of the temporary restraining orders pending appeal, and a writ of mandamus directing the district court to vacate the temporary restraining orders. This court denied the application for mandamus and noted that the matter of the temporary restraining orders could be re-

viewed after decision on the motions for preliminary injunctions.

The Railroads subsequently moved for preliminary injunctions in the district court. On March 13, 1989, the district court issued an Opinion and Order granting the Railroads' motion for preliminary injunctions "restraining [the Unions] from engaging in sympathy strikes, slowdowns, or other concerted labor activity, in connection with any picketing of plaintiffs by IAM's Eastern Air Lines members during the pendency of the Eastern Air Line/IAM strike." *The Long Island Rail Road Co. v. International Ass'n of Machinists*, No. 89-1536, slip. op. at 33-34 (S.D.N.Y. March 13, 1989) ("Slip Op."). The injunctions were issued March 17, 1989 and filed March 20, 1989.

The preliminary injunctions were issued upon the district court's finding that there existed (1) a substantial likelihood that the Railroads would succeed on the merits, and (2) a clear risk of immediate and irreparable injury to the Railroads and the public that outweighed any hardship to the Unions. Regarding success on the merits, the district court noted that none of the pertinent collective bargaining agreements contained "no strike" clauses or provisions expressly permitting or prohibiting the honoring of picket lines.[2] Slip Op. at 15. Nonetheless, the court found that the agreements were "reasonably susceptible to the plaintiffs' interpretation that there is no right of defendants to engage in the contemplated sympathetic action under any of the collective bargaining agreements in issue," *id.* at 21, with the result that an arbitrable dispute existed as to whether the unions had a right to encourage a secondary strike, *id.* at 27. The court determined that it had jurisdiction under the RLA to enjoin the strike pending compliance

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[2] The record includes evidence that agreements between the L.I.R.R. and two supervisory unions may contain "no strike" clauses, but this does not materially alter the overall situation.

with the mandated RLA procedures, *id.* at 31, and that the stated purpose of the RLA "to avoid any interruption to commerce or to the operation of any carrier," *see* 45 U.S.C. § 152 First (1982), together with the Act's imposition of a duty to exhaust settlement procedures, would be a "nullity" if a temporary injunction did not issue, *id.* at 27.

Regarding harm to the Railroads, the court found that the cessation of plaintiffs' rail operations would result in immediate and irreparable injury to them in the form of economic losses and the loss of good will not compensable in monetary damages. *Id.* at 32. The court also found additional damage to the commuting public in the form of economic loss and inconvenience. *Id.* at 32-33. The court determined that these injuries decidedly outweighed the Unions' hardship in not being able to express solidarity with the IAM in its dispute with Eastern. *Id.* at 33.

The district court's preliminary injunctions, some of whose provisions have already been described above, required the Unions to (1) rescind and withdraw prior "orders, directions, requests or suggestions" that any IAM picket lines be honored; (2) communicate the provisions of the injunctions to the employees whom they represent, including the posting of notices; and (3) "take all affirmative steps necessary to prevent disruption of normal rail operations."

The Unions then moved to stay the preliminary injunctions pending appeal, which motion the district court denied. The defendants thereafter moved this court for an expedited appeal, a stay pending appeal, and consolidation of the four appeals. Those motions are determined as hereinabove indicated.

Discussion

On an appeal from the grant of a preliminary injunction, we disturb the relief afforded by the district court

only upon a showing either of abuse of the district court's discretion, *see Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931-32 (1975), or a clear mistake of law, *see Seaboard World Airlines, Inc. v. Tiger Int'l, Inc.*, 600 F.2d 355, 360 (2d Cir. 1979); *see also Consolidated Rail Corp. v. Brotherhood of Maintenance of Way Employees*, 792 F.2d 303, 304-05 (2d Cir. 1986) (vacating preliminary injunction enjoining secondary picketing because of district court's clear legal error); *Emery Air Freight Corp. v. Local Union 295*, 449 F.2d 586, 591 (2d Cir. 1971) (same), *cert. denied*, 405 U.S. 1066 (1972).

A. *The Railway Labor Act and the Norris-LaGuardia Act.*

Section 2 First of the RLA provides:

> It shall be the duty of all carriers . . . and [their] employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

45 U.S.C. § 152 First (1982); *see Chicago & North Western Ry. Co. v. United Transp. Union*, 402 U.S. 570, 575-77 (1971) (RLA § 2 First expresses legal mandate rather than policy exhortation). In order to carry out this purpose, the RLA establishes elaborate procedures for resolving disputes in the industries to which it applies.

The Norris-LaGuardia Act, 29 U.S.C. §§ 101-115 (1982 & Supp. IV 1986), is in tension with the RLA. Section 1 of the Norris-LaGuardia Act provides:

> No court of the United States . . . shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or grow-

> ing out of a labor dispute, except in a strict conformity with the provisions of [the Norris-LaGuardia Act]; nor shall any such restraining order or temporary or permanent injunction be issued contrary to permanent injunction be issued contrary to the public policy declared in [the Norris-LaGuardia Act].

29 U.S.C. § 101 (1982).

The Supreme Court has accommodated the competing demands of the RLA and the Norris-LaGuardia Act by holding that the latter " 'does not deprive the federal court of jurisdiction to enjoin compliance with various mandates of the Railway Labor Act.' " *Burlington Northern R.R. Co. v. Brotherhood of Maintenance of Way Employes*, 481 U.S. 429, 445 (1987) (quoting *International Ass'n of Machinists v. Street*, 367 U.S. 740, 772 (1961)). As the Court more fully stated in *Brotherhood of R.R. Trainmen v. Chicago River and Indiana R.R. Co.*, 353 U.S. 30 (1957):

> We hold that the Norris-LaGuardia Act cannot be read alone in matters dealing with railway labor disputes. There must be an accommodation of that statute and the Railway Labor Act so that the obvious purpose in the enactment of each is preserved. We think that the purposes of these Acts are reconcilable.

Id. at 40.

The RLA creates an elaborate arbitration and mediation process designed to settle all "major" and "minor" disputes between a carrier and its employees. *See Elgin J. & E. Ry. Co. v. Burley*, 325 U.S. 711, 722-728 (1945), *aff'd on rehearing*, 327 U.S. 661 (1946); *see also Local 553, Transp. Workers Union v. Eastern Air Lines, Inc.*, 695 F.2d 668, 673 (2d Cir. 1983). Minor disputes grow out of "grievances or . . . the interpretation or application of agreements concerning rates of pay, rules or working

conditions," 45 U.S.C. 153 First (i) (1982), and are subject to arbitration before the National Railroad Adjustment Board. 45 U.S.C. § 153 (1982). Generally speaking, major disputes are those "concerning changes in rates of pay, rules, or working conditions," 45 U.S.C. § 155 First (a) (1982), and are subject to mediation before the National Mediation Board if not adjusted by the parties in conference. *Id.* Minor disputes are finally determined by binding arbitration before the Adjustment Board, however, whereas major disputes which are not resolved by mediation before the Mediation Board may ultimately lead to self help, including strikes, as occurred in the IAM/Eastern situation. *See supra* note 1.

The requirement of arbitration for minor disputes is an integral part of the RLA policy to avoid interruption to commerce by the transportation industries. *See Brotherhood of R.R. Trainmen v. Chicago River & Indiana R.R. Co.*, 353 U.S. 30, 36 (1957). That case answered in the negative the question "whether a railway labor organization can resort to a strike over matters pending before the Adjustment Board," *id.* at 31, and determined that the Norris-LaGuardia Act does not preclude injunctive relief to bar such a strike, *id.* at 39-42. Similarily, an anti-strike injunction may issue against strike activity undertaken prior to initiation of the statutory procedures. *Long Island R.R. Co. v. System Federation No. 156*, 368 F.2d 50 (2d Cir. 1966).

The Unions contend, however, that the sympathy strike which they propose is not a "dispute" between the Unions and the Railroads, and therefore is not subject to the resolution procedures of the RLA. Their claim is not without case support. *See Eastern Air Lines, Inc. v. Air Lines Pilots Ass'n, Int'l*, No. 89-5229 (11th Cir. March 24, 1989) ("[o]rdinarily, it is lawful to honor picket lines, and the RLA does not unambiguously preclude sympathy strikes"); *Brotherhood of Locomotive Firemen and Enginemen v. Florida East Coast Ry. Co.*, 346 F.2d

673, 675-76 (5th cir. 1965) (sympathy strike treated as part of provoking major dispute which had reached stage of permissible self-help); *Arthur v. United Air Lines, Inc.*, 655 F. Supp. 363, 367 (D. Colo. 1987) (unlawful under RLA to terminate non-union employees who sympathy strike absent evidence that terminations necessary to prevent disruption of vital transportation services); *Western Maryland R.R. Co. v. System Bd. of Adjustment*, 465 F. Supp. 963, 975(D. Md. 1979) (sympathy strike not enjoinable under RLA); *Northwest Airlines, Inc. v. Transport Workers Union*, 190 F. Supp. 495, 498 (W.D. Wash. 1961) (sympathy strike treated as aspect of another union's major dispute).

Other courts, however, have held that a sympathy strike presents a dispute subject to RLA resolution procedures, and is accordingly enjoinable. *See Trans Int'l Airlines, Inc. v. International Bhd. of Teamsters*, 650 F.2d 949 (9th Cir. 1980) (sympathy strike by employees subject to "no strike" clause enjoined under RLA pending determination of contractual rights pursuant to minor dispute resolution procedures), *cert. denied*, 449 U.S. 1110 (1981); *Northwest Airlines, Inc. v. Air Line Pilots Ass'n, Int'l*, 442 F.2d 246 (8th Cir. 1970), *aff'd on rehearing*, 442 F.2d 251 (8th Cir.) (sympathy strike enjoinable under minor dispute resolution procedures of RLA notwith standing absence of "no strike" clause, because contract may arguably be interpreted as implicitly prohibiting honoring of picket lines), *cert. denied*, 404 U.S. 871 (1971); *Chicago & Illinois Midland Ry. Co. v. Brotherhood of R.R. Trainmen*, 315 F.2d 771 (7th Cir.) (sympathy strike enjoinable where no effort made to comply with minor dispute resolution procedures of RLA), *vacated as moot*, 375 U.S. 18 (1963); *Northwest Airlines, Inc. v. International Ass'n of Machinists*, Civ. No. 3-89-108 (D. Minn. March 17, 1989) (sympathy strike enjoinable under RLA where collective bargaining agreement includes "no strike" clause); *International*

Ass'n of Machinists v. Airline Indus. Relations Conf. Civ. 89-0514 (D.D.C. March 16, 1989) (same); *South Eastern Pa. Transp. Auth. v. International Ass'n of Machinists*, Civ. No. 89-1604 (E.D. Pa. March 8, 1989) (same); *Trans World Airlines v. International Ass'n of Machinists*, 629 F. Supp. 1554 (W.D. Mo. 1986) (same).

While the Union's underlying reason for striking may be directed at Eastern rather than the Railroads, the Unions' assertion of a right to sympathy strike effectively renders the dispute one between the Railroads and the Unions over whether their collective bargaining agreements allow sympathy strikes. That dispute should be arbitrated under the minor dispute resolution procedures of the RLA.

Given (1) the requirements of 45 U.S.C. § 152 First, which expresses a legal mandate rather than a policy exhortation, *Chicago & North Western Ry. Co. v. United Transp. Union*, 402 U.S. 570, 575-76 (1971), that the parties both "make and maintain agreements concerning rates of pay, rules, and working conditions" and "settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier;" and (2) the elaborate procedures provided by the RLA for the resolution of disputes between employers and unions subject to its governance, we agree with the district court and the weight of authority cited above that the unions here may not engage in a sympathy strike without first exhausting the applicable RLA procedures.

It is true that the collective bargaining agreements between the Unions and the Railroads generally do not include a "no strike" clause. *But see supra* note 2. Thus, any proscription on sympathy strikes must be implied from less specific language of the collective bargaining agreements and the practices of the parties. This fact does not preclude arbitration of the dispute pursuant to

the RLA procedures, however, although it may decrease the Railroads' likelihood of prevailing on the underlying dispute. To determine whether an arbitrable minor dispute is presented, we must ascertain whether a "plausible interpretation" of the collective bargaining agreement is presented by the party seeking arbitration. *Local 553, Transport Workers Union v. Eastern Air Lines, Inc.*, 695 F.2d 668, 673 (2d Cir. 1983); *see United Transp. Union v. Burlington Northern, Inc.*, 458 F.2d 354, 357 (8th Cir. 1972) ("the test to be applied is that if the contract is reasonably susceptible to the interpretations sought by both the carrier and union, the dispute is minor and within exclusive adjustment jurisdiction"); *Railway Labor Executives Ass'n v. Norfolk & Western Ry. Co.*, 833 F.2d 700, 705 (8th Cir. 1987) ("if there is any doubt as to whether a dispute is major or minor a court will construe the dispute to be minor").

We note that most of the cases which have held the sympathy strike issue subject to arbitration dealt with collective bargaining agreements that included a "no strike" clause, *e.g., Trans Int'l Airlines, Inc. v. International Bhd. of Teamsters*, 650 F.2d 949 (9th Cir. 1980), *cert. denied*, 449 U.S. 1110 (1981), but some did not, *e.g., Northwest Airlines, Inc. v. Air Line Pilots Ass'n, Int'l*, 442 F.2d 246 (8th Cir. 1970), *aff'd on rehearing*, 442 F.2d 251 (8th Cir.), *cert. denied*, 404 U.S. 871 (1971). After a review of the record and an evidentiary hearing, which included examination not only of the pertinent agreements but also of such "incidents of employment" as arbitration awards, operating rules and attendance policies, Slip Op. at 16-20, the district court found that the "collective bargaining agreements contain a variety of affirmative obligations of the employer and the union employees involved, which assume a regular and on-going working relationship," *id.* at 26, and concluded that "the collective bargaining agreements are reasonably susceptible to the plaintiffs' interpretation that there

is no right of defendants to engage in the contemplated sympathetic action under any of the collective bargaining agreements in issue," *id.* at 21. We agree. Consequently, the disputes are arbitrable and the preliminary injunctions were properly entered.

Finally, the Unions' reliance on *Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 397 (1976), as precluding issuance of an injunction is misplaced. That case, which declined to enjoin a sympathy strike pending contractual arbitation of the union's right to engage in the strike, was decided under the National Labor Relations Act, under which "'[t]here is no general federal anti-strike policy.'" *Id.* at 409 (quoting *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195, 225 (1962) (Brennan, J., dissenting)). Here, on the contrary, the RLA governs, and the major purpose of the passage of the RLA was to prevent strikes in the transportation industries subject to its governance. *Detroit & Toledo Shore Line R.R. Co. v. United Transp. Union*, 396 U.S. 142, 148 & n.13 (1969). *Buffalo Forge* is therefore inapposite in the RLA context, as other courts have concluded. *See, e.g., Trans Int'l Airlines, Inc. v. International Bhd. of Teamsters*, 650 F.2d 949, 965-66 (9th Cir. 1980), *cert. denied*, 449 U.S. 1110 (1981).

B. *Burlington Northern.*

The Unions nonetheless contend that forbidding a sympathy strike here is contrary to the principle established by *Burlington Northern R.R. Co. v. Brotherhood of Maintenance of Way Employees*, 481 U.S. 429 (1987), where the Court held that the RLA placed no bar on secondary picketing by a union which had exhausted RLA settlement procedures with the employer, and sought to picket railroads other than the employer in the primary dispute. The district court ruled that *Burlington Northern* authorizes the picketing of the Railroads by IAM representatives who are employees of Eastern, rather than the Railroads,

and the preliminary injunctions entered below specifically so provide.[3] The Railroads have not challenged this portion of the court's ruling.

We agree that it is somewhat anomalous that secondary picketing is allowed by *Burlington Northern*, but considerably undercut in its effectiveness by the type of injunction entered here. *See Arthur v. United Air Lines, Inc.*, 655 F. Supp. 363, 367-68 (D. Colo. 1987) (effectiveness of self-help diminished); *Western Maryland R.R. Co. v. System Bd. of Adjustment*, 465 F. Supp. 963, 975 (D. Md. 1979 ("without the expectation that picket lines would be honored, picketing is of little practical effect"). This results, however, from the need to reconcile a primary union's right to engage in the full extent of economic self help with a secondary unions own RLA obligations. The difficulty is partially reduced by the fact that unions which have exhausted their RLA responsibilities may still enlist for support third parties not subject to the strictures of the RLA.[4]

More importantly, it seems a greater anomaly to conclude that the detailed procedures of the RLA, whose explicitly stated purpose is to prevent interruptions to commerce and the operation of transportation carriers, are inoperative when a union which has made no pretense of complying with those procedures seeks to strike in the

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[3] The secondary picketing in *Burlington Northern* was closer to home, in the sense that it occurred within the same (railroad) industry.

[4] We note in this regard that the RLA does not preclude the Unions from enlisting the support of unions not covered by the RLA, *see Buffalo Forge*, 428 U.S. at 407-09 (court has no jurisdiction to enjoin sympathy strike by non-RLA union pending outcome of arbitration under collective bargaining agreement), the public, *see Burlington Northern*, 481 U.S. at 452 ("pressures of informed public opinion" part of economic self help) (quoting *Chicago & North Western Ry. Co. v. United Transp. Union*, 402 U.S. 570, 597-98 (1971) (Brennan, J., dissenting)), or individual employees not acting in concert.

face of an employer contention that engaging in the strike violates their collective bargaining agreement. We see no reason why a union should be accorded greater rights to engage in a sympathy strike to apply pressure against *another* employer than it has to engage in a primary strike against the employer of its own members. If the RLA prohibits a primary strike pending arbitration, then a secondary strike should also be barred.

We do not view the ruling in *Burlington Northern* as establishing a contrary principle. Although the Supreme Court there concluded that the primary union may " 'employ the full range of whatever peaceful economic power [it] can muster,' " the Court began with the recognition that the parties " 'ha[d] unsuccessfully exhausted the Railway Labor Act's procedures.' " 481 U.S. at 447 (quoting *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 392-93 (1969)). Thus, while a union which has unsuccessfully exhausted the RLA's dispute resolution procedures may picket, we see nothing in *Burlington Northern* that would permit a secondary union to honor the picket line if that action would independently violate its own congressionally mandated obligations under the RLA.

C. *Preliminary Relief.*

To prevail in their applications for preliminary injunctions, the Railroads must show (a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief. *Jackson Dairy, Inc. v. H.P. Hood & Sons*, 596 F.2d 70, 72 (2d Cir. 1979) (per curiam). In making the determination of irreparable harm, both harm to the parties and to the public may be considered. *See New York Pathological and X-Ray Laboratories, Inc. v. INS*, 523 F.2d 79, 81 (2d Cir. 1975); *United States v.*

City of New Haven, 447 F.2d 972, 974 (2d Cir. 1971); *see also* 29 U.S.C. § 107 (1982) (specifying Norris-LaGuardia criteria for issuance of temporary or permanent injunctive relief in "any case involving or growing out of a labor dispute").

The district court found that there was a risk of immediate and irreparable injury to the Railroads and the public, and that there was a substantial likelihood that the Railroads would prevail on the merits. These determinations will not be reversed absent an abuse of discretion. *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931-32 (1975).

The finding that the Railroads and the general public would sustain irreparable harm should a strike occur is not clearly erroneous. Although the Unions would be precluded from expressing solidarity with another union by honoring its picket line, the immediate and irreparable harm to the Railroads and the public resulting from a general cessation in railroad service surpasses that of the Unions. Similarly, because we agree that the collective bargaining agreements are susceptible to the Railroads' interpretation, we conclude that the district court did not err in finding a likelihood of success on the merits. Accordingly, we find no error in the order granting the preliminary injunctions, with one modification.

Although the preliminary injunctions correctly proscribe the Unions' encouragement of activity by Railroad employees in support of a sympathy strike, the injunctions in behalf of the L.I.R.R., Metro-North and NJ Transit could be read to enjoin the activities of Railroad employees not acting in concert. Those injunctions all restrain "the employees represented" by the Unions from participating in "any . . . interruption in the operation of [L.I.R.R., Metro-North or NJ Transit] by and among any of [their] employees." The Amtrak injunction, in contrast, prohibits only employee participation in "con-

certed labor activity disruptive of Amtrak's normal rail operations."

We believe that the other preliminary injunctions should be revised to conform to the Amtrak model. The Opinion and Order of the district court, pursuant to which the preliminary injunctions were issued, called only for "a temporary injunction . . . restraining defendants from engaging in sympathy strikes, slowdowns, or other *concerted labor activity*, in connection with any picketing of plaintiffs by IAM's Eastern Air Lines members during the pendency of the Eastern Air Line/IAM strike." Slip. Op. at 33-34 (emphasis added). In addition, individual employees represented by the Unions are not parties to these actions, and may be subjected to the restraints of the injunctions only if "in active concert or participation" with parties thereto. Fed. R. Civ. P. 65(d); *see Chicago & Illinois Midland Ry. Co. v. Brotherhood of R.R. Trainmen*, 315 F.2d 771, 773 n.2 (7th Cir.) (approving injunction exempting individual employee refusals to work), *vacated as moot*, 375 U.S. 18 (1963). In any event, the variation between the injunctions issued below appears inadvertent.

Finally, we approve those provisions of the injunctions which require affirmative actions of the Unions in (1) rescinding and withdrawing prior "orders, directions, requests or suggestions" that any IAM picket lines be honored, (2) communicating the provisions of the injunctions to the employees whom they represent, including the posting of notices, and (3) "tak[ing] all affirmative steps necessary to prevent disruption of normal rail operations." In view of the evidence cited by the district court concerning prior encouragement by the Unions of the anticipated sympathy strikes, it was not an abuse of discretion to order this relief. *See NLRB v. Nashville Bldg. & Const. Trades Council Local 429*, 425 F.2d 385, 392 (6th Cir. 1970); *NLRB v. Teamsters Local Union 327*, 419 F.2d 1282, 1284 (6th Cir. 1970).

Conclusion

Consistent with the foregoing, the orders granting the preliminary injunctions are affirmed, with the modification that the L.I.R.R., Metro-North and NJ Transit injunctions shall be amended to specify that, as to the employees themselves, only concerted activity is prohibited. The various motions to this court are determined as hereinabove indicated.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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89 Civ. 1536 (RPP)

THE LONG ISLAND RAIL ROAD CO.,
Plaintiff,

- against -

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, *et al.*,
Defendants.

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89 Civ. 1535 (RPP)

METRO-NORTH COMMUTER RAILROAD CO.,
Plaintiff,

- against -

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, *et al.*,
Defendants.

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89 Civ. 1516 (RPP)

NJ TRANSIT RAIL OPERATIONS, INC.,
Plaintiff,

- against -

THE BROTHERHOOD OF RAILROAD SIGNALMEN, *et al.*,
Defendants.

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89 Civ. 1504 (RPP)

NATIONAL RAILROAD PASSENGER CORP.,
Plaintiff,

- against -

AMERICAN RAILWAY AND AIRWAY SUPERVISORS ASSOCIATION, *et al.*,
Defendants.

OPINION AND ORDER

ROBERT P. PATTERSON, JR., District Judge.

These motions for preliminary injunctions were brought on by (a) orders to show cause signed by the Court on March 5, 1989 after a six-hour hearing on March 4, 1989 at which counsel for plaintiffs Metro-North Commuter Railroad Co. (Metro-North), the Long Island Rail Road Co. (LIRR) and NJ Transit Rail Operations, Inc. (NJT) and counsel for defendants presented arguments to the Court, and (b) an order to show cause signed by the Court on March 6, 1989, after hearings on March 5, 1989 and March 6, 1989 at which counsel for plaintiff National Railroad Passenger Association (Amtrak) and counsel for defendants presented arguments to the Court. Each order to show cause contained a temporary restraining order against defendants ordering them not to engage in a sympathy strike or other concerted labor activity against the plaintiff in connection with the threatened picketing of plaintiffs' premises by members of defendant International Association of Machinists and Aerospace Workers (IAM), which has been engaged in a bitter strike against Eastern Air Lines and which also represents employees of each the plaintiffs.

Each order to show cause was made returnable on March 8, 1989 at 2:00 p.m. On March 7, 1989, the

Court, *sua sponte*, extended the temporary restraining orders until midnight on March 10, 1989. Evidentiary hearings, including arguments on the law, on the motions for preliminary injunctions, were held on March 8 and 9, 1989 in a consolidated hearing for all four cases. On March 10, 1989 the temporary restraining orders were extended until the issuance of this opinion and order. All the plaintiffs are carriers by rail and bring these motions for a preliminary injunction, pursuant to complaints that seek that relief under the Railway Labor Act (RLA), 45 U.S.C. 151 *et seq.*[1]

This opinion shall constitute findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a).

Jurisdiction and Venue

Jurisdiction of these actions is founded on 28 U.S.C. §§ 1331, 1337. Venue lies in the Southern District of New York, as plaintiffs have each presented evidence establishing that they have substantial operations in this district and that the threatened acts of defendants will occur in this district. 28 U.S.C. § 1391(b).

The Parties

A. Metro-North

Metro-North operates commuter rail service on behalf of the Metropolitan Transportation Authority and the Connecticut Department of Transportation. Its operations include rail lines, known as the Hudson, Harlem and New Haven Lines. It operates some 525 trains daily into and out of Grand Central Terminal that carry approximately 85,000 daily commuters.

Metro-North had collective bargaining agreements negotiated under the RLA with all of the union defend-

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[1] NJT filed an amended complaint on March 6, 1989, adding five unions as defendants. Counsel have stipulated that those defendants will be bound by this decision.

ants named in its complaint. With the exception of the agreement with Local 808, International Brotherhood of Teamsters (Local 808), all of the collective bargaining agreements became effective on January 1, 1986 and became amendable on January 1, 1989. Local 808 has not entered into a new collective bargaining agreement since its service of a notice pursuant to § 6 of the RLA, prior to the expiration of its prior agreement on December 31, 1985, but has not been released from mediation before the National Mediation Board. All of the other defendant unions sued by Metro-North in this action have served notices pursuant to § 6 of the RLA indicating their intention to make changes in rates of pay, rules and working conditions. The service of the § 6 notices has the effect of making Metro-North and all of the defendant unions subject to the status quo requirements of the RLA, preventing the unilateral change of rates of pay, rules or working conditions.

B. LIRR

The LIRR operates commuter rail service on behalf of the Metropolitan Transportation Authority. It operates some 727 trains daily into and out of Pennsylvania Station that carry approximately 272,000 daily commuters. The LIRR also carries freight in interstate commerce and is an integral part of the national railway system.

The LIRR has collectively bargained agreements negotiated under the RLA with all the defendant unions named in its complaint which continue in effect until June 30, 1989. Pursuant to the moratorium provisions in these agreements, § 6 notices indicating the intention to make changes in rates of pay, rules and working conditions, were served in January 1989, but are not effective until June 30, 1989.

C. NJT

NJT, an instrumentality of the State of New Jersey, operates 565 daily trains on ten rail lines which account

for approximately 186,000 one-way daily passenger trips (approximately 93,000 round-trip passengers). The destination of most NJT passengers is New York City, with Northeast Corridor trains (NJT's most heavily traveled line) and North Jersey Coast Line Trains terminating in Penn Station, Manhattan. Other service has termini in Newark and Hoboken, New Jersey from which passengers may transfer to PATH lines to New York City. In addition to the terminals at Newark and Hoboken, New Jersey, other New Jersey locations and Penn Station, New York, NJT operates service that originates in Port Jervis, Suffern and Spring Valley, New York and provides service to other Rockland County, New York communities. NJT has 4,000 employees, 3,500 of whom are represented by unions.

NJT has collective bargaining agreements negotiated under the RLA in full force and effect with each of the defendant unions named in its complaint.

D. Amtrak

Amtrak is engaged in the rail transportation of passengers, mail and express packages in intrastate and interstate commerce throughout the continental United States. It operates 100 passenger trains per day in the Northeast corridor, including approximately 70 trains per day between Washington, D.C. and Philadelphia; 84 trains (including the 70 trains above) per day between Philadelphia and New York, and 20 trains between New York and Boston. In addition, Amtrak operates key components of rail lines which the other railroad plaintiffs in the Northeast corridor operate.

Amtrak has collective bargaining agreements, in full force and effect, negotiated under the RLA with each of the defendant unions named in its complaint.

E. Defendants

Defendants in the Metro-North complaint are International Association of Machinists & Aerospace Workers

(IAM), American Railway and Airway Supervisors Associations (ARASA), American Train Dispatchers Association (ATDA), Brotherhood of Railroad Signalmen (BRS), Brotherhood of Locomotive Engineers (BLE), International Brotherhood of Electrical Workers (IBEW), Local 495, Hotel & Restaurant Employees Bartenders International Union (Local 495), International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers (IBB), International Brotherhood of Firemen & Oilers (IBF&O), Local 808, International Brotherhood of Teamsters (Local 808), Sheetmetal Workers International Association (SWIA), Transport Workers Union of America (TWU), Local 1460, Transport Workers Union (Local 1460), Transportation Communication International Union (TCIU), TCIU-TC Division and the United Transportation Union (UTU) (collectively, the "Metro-North unions"). Collective bargaining agreements set forth the terms and conditions of employment of the Metro-North employees represented by those unions. (Ex. 69-89; Tr. 14)

The LIRR has collective bargaining agreements with defendants IAM, ARSA, BRS, BLE, IBEW, IBF&O, SWIA, UTU, TCU and the National Transportation Supervisors Association (NTSA) (collectively, the "LIRR unions"), which set forth the terms and conditions of employment of the LIRR employees represented by those unions. (Ex. 30-40, 93-95; Tr. 14)

NJT has collective bargaining agreements with defendants IAM, ARASA, ATDA, BRS, IBEW, IBB, IBF&O, SWIA, TWU, TCIU, BLE, three divisions of the UTU; UTU-Yardmasters (UTU-Y), UTU-Trainmen (UTU-T), Brotherhood of Railway Carmen, a Division of TCU (BRC) and the Brotherhood of Maintenance of Way Employees (BMWE) (collectively, the "NJT unions") (NJT-15), which set forth the terms and conditions of employment of the NJT employees represented by those unions.

Amtrak has collective bargaining agreements with defendants ARASA, Amtrak Service Workers Council, ATDA, BLE, IBB, IBEW, IBF&O, Railroad Yardmasters of America (RYA), SWIA, TCU and UTU (collectively, the "Amtrak unions"), which set forth the terms and conditions of employment of the Amtrak employees represented by those unions.

The Threat of Picketing

The IAM, through its District Lodge 100, represents employees of Eastern Air Lines, a carrier by air within the meaning of the RLA, 45 U.S.C. § 181. The IAM and Eastern have been engaged in negotiations over changes in their collective bargaining agreement since November 1987. On January 31, 1988, the National Mediation Board (NMB) declared the Eastern-IAM negotiations to be at an impasse and proffered arbitration pursuant to RLA § 5 First, 45 U.S.C. § 155 First. Eastern rejected the offer of arbitration and the 30-day cooling off period prescribed by the RLA began. The IAM-represented employees of Eastern struck at 12:01 a.m. on March 4, 1989, the expiration of the cooling off period prescribed by the RLA.

On or about February 2, 1989, in a letter sent to the NMB by William W. Winpisinger, International President of the IAM, the IAM informed the NMB that it would engage in secondary picketing in the air, rail and manufacturing industries.

The IAM has actively sought the support of the defendant unions in urging, encouraging and instructing employees represented by those unions not to cross IAM picket lines. (Tr. 14, 57-63, 118)[2] Prior to the granting of a temporary restraining order on March 5, the IAM bargaining units at the LIRR, through their local chair-

[2] This refers to the transcript of hearings held March 9 and 10, 1989, and pages thereof.

men, had been aiding the Eastern machinists in their plan to disrupt railroad operations. This aid included, *inter alia*, providing Eastern IAM officials with information regarding LIRR trainyards, including maps and directions, to assist it in picketing the LIRR. (Tr. 58-60)

The defendants have stipulated in this action that picketing and secondary activity by IAM against plaintiffs was and is a real threat on the part of IAM and is still part of IAM's strike strategy. (Tr. 118) At the hearing on March 9, 1989, defendants' counsel were asked to advise the Court if the filing of Chapter 11 bankruptcy reduced this threat and have not done so.

Prospective Sympathetic Action

All of the defendant unions except the UTU defendants have stipulated that if IAM picket lines are established at the faciilties and/or properties of the plaintiff railroads, these defendants will urge and encourage all union members employed by the plaintiff railroads to refuse to cross those IAM picket lines. (Tr. 14)

All defendants have stipulated that if the defendant unions urge and encourage their members to honor IAM picket lines, the members are not likely to cross those lines and the plaintiff railroads will be forced to cease operation. (Tr. 14-15)

The UTU defendants have stipulated that if IAM picket lines are established at the facilities and/or properties of the plaintiff railroads, the UTU defendants will act to protect and defend the rights of their members not to cross the picket lines. These defendants also concede that no member of the UTU ever has crossed a picket line. In their view, their members do not require instructions not to cross picket lines and there is no evidence to establish that the UTU has ordered its members not to cross picket lines or IAM's lines under threat

of discipline. However, Chairman Yule of the UTU has asked his union members to honor the picket lines.

In response to this IAM threat, and to the call for support made by the IAM to defendant unions, all defendant unions other than UTU have urged, encouraged and in some instances directed their members not to cross an IAM picket line. (Tr. 14, 137-39; Ex. 13, 16, 19, 64, 93; Ex. C and D. to Bergen Aff.) General Chairman Hanley of the TCU, for example, testified that he had received a directive from the International TCU, sent to all offices and General Chairmen, telling them to instruct their members to support, and not cross, an IAM picket line. (Tr. 156-63) Mr. Hanley also testified that he has advised his local chairman that any members of the TCU who crossed an IAM picket line is "not better than a scab." (Tr. 162-163) Chairman Hanley stated that it was in the interest of his union to have the tactics of somebody like Lorenzo stopped; that if those tactics are not stopped they will carry over into his union's negotiations with the LIRR. (Tr. 154)

At least some of the union constitutions and bylaws, e.g., those of the IBT, IAM, UTU and TCU, contain disciplinary procedures, including the imposition of fines and expulsion from membership, against union members for various activity. (Tr. 135, 160-63, 178-80; UTU Ex. 1 at 70) The testimony showed that such discipline could be imposed on union members who cross a picket line and that at least one union (TCU) conveyed to members that they would be fined two days pay for each day worked while a picket line was in place, but there was no evidence of such penalties being actually imposed. (Tr. 136-37; 160-62; 178-80)

Additional, unrebutted evidence, contained in Amtrak's Fagnani affidavit, is admissible under *SEC v. Frank*, 388 F.2d 486 (2d Cir. 1968). On Friday, March 3, 1989, Amtrak's Director of Labor Relations, Joseph M. Fagnani,

talked with C.P. Jones, the UTU General Chairman who represents train service employees in Amtrak's Northeast Corridor work zone 2 and in Amtrak's Off-Corridor work zones. Mr. Jones stated flatly that the employees he represents would not cross picket lines set up by Eastern Air Lines employees at Amtrak locations. (Amtrak's Fagnani Aff., ¶ 2) Mr. Fagnani also spoke that day with Mr. W.A. Beebe, the UTU General Chairman who represents train service employees in Amtrak Northeast Corridor work zone 1. He also stated that employees they represent would not cross picket lines set up by Eastern employees at Amtrak locations.(Amtrak's Fagnani Aff., ¶ 3).

A labor organization's commitment to "urge and encourage" or "protect and defend" a concerted refusal by union members to cross IAM picket line can include the use of communications which in fact are subtle signals to convey the message to not report for work. *Complete Auto Transit Inc. v. Reis*, 451 U.S. 401, 418 n.1 (1981). In this connection, the court has considered the following:

> (i) The UTU General Chairman for the LIRR sent a letter, dated March 3, 1989, addressed to union members warning that "it would not be safe" to cross any picket lines manned by I.A.M. workers. (Yule letter dated March 3, 1989, Ex. to Cohn Aff.);
>
> (ii) On March 3, TCU representatives for Amtrak employees at One Penn Plaza in New York, across the street from Penn Station, warned assembled employees that any union members who failed to honor a picket line would be fined one day's pay for one day's work (Tr. 83);
>
> (iii) On March 7, a notice was found posted on the bulletin board at the ARSA [sic] foreman's offices in Amtrak's maintenance facility in Chicago warning employees that BRAC (now the TCU of which ARSA is a division) has a tradition of re-

specting picket lines established by other labor unions and that any member who fails to do so will be subject to being charged with a violation of the "policies and laws of our Brotherhood," and if charged and found guilty, will be subject to a fine of not less than the amount earned by the member for each day the member worked during the picketing or strike. (Tr. 92-94; Amtrak ex. 26; *see* Tr. 152, 160.)

(iv) On March 3, a notice was found posted on the bulletin board in the Amtrak employee's lunchroom in Washington, D.C., warning that the Brotherhood of Locomotive Engineers will support and, "if necessary, place the full power of the B. of L.E. behind the members of the B. of L.E., who because of *fear* of hazard or injuries to themselves or families or *damage to their personal property decline to cross picket lines*" (emphasis in original). (Tr. 86, 87; Amtrak ex. 25.)

(v) The TCU General Chairman for the LIRR publicly proclaimed that any union member who crossed the picket line is "no better than a scab." His statement was quoted in a widely-circulated local newspaper, Newsday, on March 5. This union official also admitted in testimony that the penalty for crossing a bona fide picket line is two days pay for each day's work. (Tr. 161-64; *see* Tr. 23, 25-27; ex. 19.)

(vi) Whether accurate or not, a widely-read New York newspaper, the New York Post, quoted UTU General Chairman of the LIRR on March 3 as warning: "It's unsafe to cross picket lines because it can get bloody." (Ex. to LIRR's Cohen Aff.)

(vii) The union representative of the American Train Dispatchers Association (ATDA) in New York warned an Amtrak dispatcher on March 3 that

if a union member crossed the picket line he would be expelled from the union. If expelled, an ATDA member could no longer work as a train dispatcher for Amtrak. (Tr. 89-91.)

(viii) The testimony of Mr. Pokoj of the Teamsters Union that, as union representative, he would not instruct the union's members to honor the IAM picket lines but that he would volunteer his personal view to that effect.

Potential Impact

If an IAM picket line is established at the premises and property of plaintiffs, the union members are not likely to cross, particularly if their unions have urged, encouraged and/or instructed them not to do so, which action will cause plaintiffs to cease operations. None of the railroads can operate if members of the UTU fail to report for work. (Tr. 247, 260) Credible evidence was adduced at the hearing that if a single union did not report for work the railroad would be forced to cease operations. In view of the other unrefuted evidence that, since most of the union defendants represent employees of all four carrier plaintiffs, and as Metro-North, LIRR and NJT interconnect and share some common facilities with Amtrak, the honoring of the IAM's picket lines by any one of the defendant unions against any one of the plaintiff carriers could, in all probability, cause that carrier to cease operations and the other plaintiff carriers as well.

Indeed, because of the operational interrelationship between Amtrak's intercity service and local commuter services, if any of the defendant unions' members honor Eastern picket lines and do not report to work, it would virtually prevent all passenger rail traffic from moving between cities on the Northeast Corridor, as well as into and out of most major cities in the northeast and elsewhere. (Amtrak's Larson Aff., ¶¶ 2-3.)

The Collective Bargaining Agreements

Plaintiffs all contend that the purposes of the RLA will be violated if the threatened picketing occurs or if the threatened concerted sympathetic action by defendants and their railroad employees honoring those picket lines takes place.

Their contentions are based on the statutory design of the RLA and the provisions in the collective bargaining agreements they have with the defendants in their actions. The defendants claim the threatened actions are permitted under the RLA by decisional precedent and that the collective bargaining agreements permit them to take collective action honoring the picket lines. None of the collective bargaining agreements have "no strike-no-lockout" provisions nor do they contain a provision permitting or prohibiting the honoring of picket lines. *Cf. Trans Int'l Airlines v. International Bhd. of Teamsters*, 650 F.2d 949, 964, n.11 (9th Cir. 1980), *cert. denied*, 449 U.S. 1110 (1981).

Plaintiffs rely on the following provisions of their collective bargaining agreements to prevent the threatened sympathy strike and other concerted sympathy action.

A. Metro-North

Each of the collective bargaining agreements between Metro-North and the defendant Metro-North unions contains a broad grievance and arbitration provision requiring the parties to submit all disputes over the application and interpretation of the agreement to arbitration. (Ex. 69-89; Tr. 14) Each of the collective bargaining agreements between Metro-North and the Metro-North unions contains provisions which, expressly or by implication, require employees to report for work as their assignments dictate, and which prohibit employees from absenting themselves from work unless expressly authorized by the applicable agreement or by Metro-North. (Ex. 69-89; Tr. 14)

Metro-North's Rules of the Operating Department, General Rules S and T, applicable to all train and engine service employees, expressly require that Metro-North "employees must not engage in any type of . . . activity which interferes with . . . performance of their railroad duties." (Ex. 92; Tr. 14)

Metro-North's written policy on attendance, which applies to al Metro-North employees, provides that the obligation "to report to work (for duty) as scheduled, at the proper location, at the start of his/her tour of duty (workday) and to remain on duty for the full tour" is "the most important basic obligation an individual assumes as a condition of employment with Metro-North." (Ex. 91; Tr. 14)

Arbitrators' awards obtained by Metro-North have confirmed the existence of this fundamental obligation by Metro-North employees. (Ex. 66-68)

Taken together, the collective bargaining agreements and the other "incidents of employment," (*e.g.*, arbitration awards, operating rules and the attendance policy) require Metro-North employees to report to work each day unless specifically excused. (Ex. 66-89, 91-92)

B. LIRR

Each of the collective bargaining agreements between the LIRR and the defendant LIRR unions contains a broad grievance and arbitration provision requiring the parties to submit all disputes concerning the application or interpretation of those agreements to arbitration. (Ex. 30-40; 93-95; Tr. 14) Each of the collective bargaining agreements contains provisions which, expressly or by implicaton, require employees to report to work as their assignments dictate, and prohibit employees from absenting themselves from work, unless expressly authorized by the applicable agreement or by the LIRR. (Ex. 30-40, 93-95; Tr. 14) There is no provision in any

of the LIRR's various collective bargaining agreements that permit employees to fail to report for work because of the establishment of a picket line. (Ex. 30-40, 93-95)

The obligation of LIRR employees to appear for work has also been established in a series of arbitration decisions that repeatedly have held that LIRR employees are obligated to appear for work as assigned. (Ex. 24-29)

Taken together, the collective bargaining agreements and the other "incidents or employment," (*e.g.*, arbitration awards), require LIRR employees to report to work each day unless specifically excused. (Ex. 24-40, 93-95; Tr. 14)

C. NJT

Each of the collective bargaining agreements between NJT and the defendant NJT unions contains a grievance and arbitration provision requiring the parties to submit their disputes to arbitration. Each of the collective bargaining agreements between NJT and the NJT unions contains numerous provisions requiring employees to report for work as their assignments dictate.

NJT's Operating Rules applicable to train and engine service employees and Maintenance of Equipment Rules applicable to mechanical employees contain an express requirement that "employees must refrain from conduct which adversely affects the performance of their duties" (Operating Rule D and Mechanical Rule 33) and that "Employees must report to work at the required time." (Operating Rule T and Mechanical Rule 44) (NJT exs. 64 and 65).

The obligation of NJT employees to appear for work has also been established in a series of arbitration decisions that repeatedly have held that NJT employees are obligated to appear for work as assigned. (NJT exs. 24 through 63)

NJT has by written communication advised the defendant unions of NJT's position that, under its collective bargaining agreements with defendant unions, a refusal to cross IAM picket lines is prohibited. (NJT exs. 66 through 77) NJT has further requested a conference over any dispute regarding the interpretation of the collective bargaining agreement so that the matters may be submitted to the appropriate division of the National Railway Adjustment Board.

D. Amtrak

Amtrak's collective bargaining agreements with the defendant Amtrak unions require that the Amtrak employees represented by those unions will report for work as assigned. In return, Amtrak agrees to pay them certain wages and to provide other benefits. (Amtrak exs. 1-23, 1A-23A)

Amtrak has twenty-three different collective bargaining agreements, all of which require that Amtrak employees represented by those unions report for work as assigned with the fourteen defendant Amtrak unions. All of the agreements also have detailed provisions enumerating the circumstances under which employees are relieved of their obligation to report to work, including, e.g., sickness, jury duty, bereavement, leave of absence, personal holiday rest days, holidays and military leave. Ten of the agreements, involving eight unions, also contain a provision similar to this: an employee "shall not absent himself from his assigned position for any cause without first obtaining permission from his supervisor." (Amtrak exs. 1A, 2A, 3A, 7A, 12A, 13A, 14A, 15A, 16A, 17A) The remaining thirteen agreements, involving seven unions, enumerate in detail the reasons an employee may be absent from work. (Amtrak exs. 4A, 5A, 6A, 8A, 9A, 10A, 11A, 19A, 19A and 20A) None of the agreements contain a provision which permit employees to absent themselves from duty because they are honoring a picket line or en-

gaging in a sympathy strike. (Amtrak exs. 1-23, 1A-23A)

Each of the collective bargaining agreements between Amtrak and defendant unions provides for a comprehensive procedure for the adjustment of grievances that incorporates the Railway Labor Act's mandatory procedures for the adjustment of "minor disputes." (Amtrak exs. 1-23, 1A-23A)

In addition, all Amtrak employees, including all members of the defendant unions employed by Amtrak, are bound by the provisions of Rule of Conduct O, which expressly provides that "employees must report for duty at the designated time and place . . . employees may not be absent from their assigned duty . . . without permission from their supervisor." There is no exception in Rule O authorizing employees to honor the picket lines of others, and Amtrak has disciplined employees for engaging in illegal strike activity pursuant to these rules. (Amtrak ex. 24)

The defendants contend that since none of the collective bargaining agreements contains a no-strike provision, the parties did not intend to prevent such action. They also claim sympathy strikes were permitted by the parties during the existence of the labor agreements. In both regards, the defendants' evidence was not comprehensive and inconclusive, and considerable factual evidence remains to be gathered and presented with respect to each of the more than eighty collective bargaining agreements at issue. Furthermore, even assuming the correctness of defendants' position, it seems clear based on counsel's concession at the hearing (Tr. 329-33) that sympathy strikes of the sort contemplated, i.e., in support of a union's dispute in another industry, were not permitted under the instant collective bargaining agreements since cross industry secondary picketing, the type contemplated here, was not considered legal until after *Burlington Northern*, discussed *infra*.

In the light of the foregoing the Court finds that the collective bargaining agreements are reasonably susceptible to the plaintiffs' interpretation that there is no right of defendants to engage in the contemplated sympathetic action under any of the collective bargaining agreements in issue.

Review of the Law

The Railway Labor Act (RLA) is a unique law. In his dissent in *Elgin J. & E. Ry. v. Burley*, Mr. Justice Frankfurter described it "as primarily an instrument of government." 325 U.S. 711, 752 (1945) (Frankfurter, J., dissenting). Its first enactment in 1926 was "legislation agreed upon by the railroads and its unions and probably unique in having been frankly accepted as such by the President and Congress." *Id.* at 753. The 1934 amendment of the RLA was designed toward still greater self-government. *Id.*

Soon after the passage of the RLA, the Supreme Court stated the major purpose of Congress in passing the RLA in 1925 was "to provide a machinery to prevent strikes." *Texas & N.O. Ry. v. Railway Clerks*, 281 U.S. 548, 565 (1930).

Indeed, the first stated general purpose of the Act is "to avoid any interruption to commerce or the operation of any carrier engaged therein." 45 U.S.C. § 151a(1).

Consistent with the general purpose of the RLA stated in § 151a, the next following section places a duty on:

> all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and *to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier* growing out of any dispute between the carrier and the employees thereof.

45 U.S.C. § 152 First (emphasis added). Thus, "the duty" imposed by this section requires the settlement of all disputes "whether arising out of the application of such agreements *or otherwise*" (emphasis added). Notably, the purpose of avoiding "any interruption to commerce or to the operation of any carrier" is then reiterated.

In order to effectuate that purpose, Congress constructed the RLA to provide an elaborate arbitration and mediation process designed to settle all "minor" and "major" disputes between carriers and their employees. *Elgin J. & E. Ry. v. Burley*, 325 U.S. 711 (1945); *see also Local 553, Transp. Workers Union of Am. v. Eastern Air Lines, Inc.*, 695 F.2d 668, 673 (2d Cir. 1983). "Minor disputes" growing out of the interpretation of agreements concerning "rates of pay, rules or working conditions" are to be settled before the National Railway Adjustment Board. 45 U.S.C. § 153 First (i). "Major disputes" are to be brought before the NMB. Major disputes include "any other dispute not referable to the National Railway Adjustment Board." 45 U.S.C. § 155 First (b). The Act's arbitration and mediation processes contain "an implicit status quo requirement central to its design," *Detroit & Toledo Shore Line R.R. v. United Transp. Union*, 396 U.S. 142, 150, 151 (1960), which is "the heart of the Railway Labor Act." *Brotherhood of Ry. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 377 (1969). While disputes are working their way through the arbitration or mediation process, neither party may unilaterally alter the status quo. *Id.* at 378; *see Brotherhood of Locomotive Eng'rs v. Louisville & Nashville R.R.*, 373 U.S. 33, 38, 39 (1963). Indeed, a union will be enjoined from striking until all the statutory procedures for settling the dispute have been exhausted. *Chicago N.W. Ry. v. United Transp. Union*, 402 U.S. 570 (1971); *Local 553 v. Eastern Air Lines*, 695 F.2d at 675.

Once the statutory settlement procedures have been unsuccessfully exhausted, however, it is lawful for the car-

rier and the unions to engage in self-help by unilaterally changing working conditions or striking, as the case may be. *Local 553 v. Eastern Air Lines*, 695 F.2d at 675; *Burlington Northern R.R. v. Brotherhood of Maintenance of Way Engineers*, 481 U.S. 429 (1987); *Brotherhood of Ry. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 378, 378-79 (1969). Indeed, an RLA union is then free to engage in secondary picketing, *Burlington Northern*, *supra*, which is a form of economic self-help denied to those unions subject to the National Labor Relations Act, 29 U.S.C. § 151 *et seq. Burlington Northern*, *supra*; *see also Brotherhood of Ry. Trainmen v. Jacksonville Terminal Co.*, *supra*. But prior to that time no such action may be taken. As Mr. Justice Harlan stated in *Brotherhood of Ry. Trainmen v. Jacksonville Terminal Co.*, *supra*, 394 U.S. at 378: "While the dispute is working its way through these stages, neither party may alter the *status quo*. §§ 2 Seventh, 5 First, 6, 10." Furthermore failure to initiate the procedures of the Act for minor or major disputes before resort to self help measures is enjoinable. *Long Island R.R. v. System Fed'n No. 156*, 368 F.2d 50 (2d Cir. 1966).

Conclusions of Law

Here the actions threatened by defendants are two-fold. First, defendant IAM is threatening to set up picket lines at strategic locations at or adjacent to plaintiffs' key operational points. Second, all the defendant unions and their officers either have already instructed their members to honor such picket lines or have acknowledged that they will urge their members to take similar action to evoke a sympathy strike or concerted labor activity which effectively would close down plaintiffs' operations.[3] Consistent

[3] One defendant, the UTU, has taken the position that it will not urge its members to honor the picket lines but that its members are likely to do so without urging. There was evidence showing that Mr. Yule, its General Chairman, advised its members not to cross the IAM picket lines due to the danger to union members and their families. (Ex. 22)

with the provisions in its Temporary Restraining Orders, the Court is not persuaded that any injunction should issue to prevent the first threatened action in view of the holding in *Burlington Northern, supra.* If the right to engage in secondary picketing should not extend from the airline industry to the rail industry (cross industry secondary picketing), it is for Congress or a higher court to make that decision.

With respect to the second threatened action, however, the Court finds that the purposes of the RLA "to avoid any interruption of commerce or the operation of a carrier" and the Act's imposition of a duty requiring the exhaustion of settlement procedures as articulated under precedent would be a nullity were a temporary injunction not to issue.

Under the RLA, all the collective bargaining agreements between the plaintiffs and defendants, although many are in different status, are still in a status pursuant to which they remain binding on the parties. Under all those agreements, there is an inherent contractual commitment by union management on behalf of its members to supply the labor force in its particular craft of trade for the running of the railroads.[4] In addition, if a union encouraged a concerted failure of a union's members to report for work, its statutory "duty to maintain agreements" under 45 U.S.C. § 152 First would be violated.

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[4] In some cases, there are status quo agreements under 45 U.S.C. § 156 which would also be violated if the acts threatened took place. *Brotherhood of Railway Trainmen v. Jacksonville Terminal Co.*, 394 U.S. at 378; *American Airlines v. Air Lines Pilots Ass'n*, 169 F. Supp. 777, 787-88 (S.D.N.Y. 1958); *Long Island R.R. v. Brotherhood of R.R. Trainmen*, 185 F. Supp. 356, 358 (E.D.N.Y. 1960). As stated in *Detroit & Toledo Shore Line R.R. v. United Transp. Union*, 396 U.S. 142 (1969), 45 U.S.C. § 152 contains an "implicit status quo requirement," which is "central to its design." 396 U.S. at 150, 151.

Failure to observe the duty to exert every reasonable effort to "make and maintain agreements," 45 U.S.C. § 152 First, constituted the basis for the injunction in *Piedmont Aviation, Inc. v. ALPA*, 416 F.2d 633 (4th Cir. 1969); *Southern Ry. v. Brotherhood of Locomotive Firemen*, 384 F.2d 323, 328 (D.C. Cir. 1967); *Long Island R.R. v. System Fed'n No. 156*, 368 F.2d 50 (2d Cir. 1966); *Ozark Air Lines, Inc. v. ALPA*, 351 F. Supp. 198, 201 (E.D. Mo. 1973). Indeed, "such a remedy is the only practical, effective means of enforcing the duty to exert every reasonable effort to make and maintain agreements." *Chicago N.W. Ry. v. United Transp. Union*, 402 U.S. 570, 583 (1971).

As the findings of fact indicate in all four cases under decision, there is no so-called "no strike" provision in any of the numerous collective bargaining agreements with the defendant unions involved in the operations of the plaintiffs' railroads. Nor is there any provision in any of the collective bargaining agreements prohibiting or permitting the employees to honor picket lines. Instead, the collective bargaining agreements contain a variety of affirmative obligations of the employer and the union employees involved, which assume a regular and on-going working relationship. The plaintiffs contend that prohibitory "no strike type" language is unnecessary in view of the all inclusive nature of the employees' obligations and the special nature of the RLA's provisions. Plaintiffs also maintain that the "status quo" would be altered if the threatened activity took place, and that the RLA duty "to make and maintain" agreements would be violated. A strike or a concerted refusal to report to work or to cross picket lines would render nugatory the working conditions and rules relating to the collective bargaining agreements. Defendants' argument (that sympathy strikes or other concerted labor activity caused by sympathy with the IAM/Eastern Air Lines situation should not be considered a labor dispute) seems to disregard the

realities of the situation.[5] A strike is a strike. Here, it is sympathetic activity designed to assist a fellow union in a labor dispute with an air carrier, Eastern Air Lines, which could shut down plaintiffs' public carrier operations. As defendants' witness Hanley stated, that activity would be designed to prevent any use of Lorenzo type tactics by plaintiffs against defendants in the future. As such it would have a labor purpose.

But beyond that a labor dispute in connection with the collective bargaining agreements exists. It is whether the defendant unions have a right to encourage a collective failure to report for work or whether the collective bargaining agreements constructively prevent such action. It is true that under the National Labor Relations Act (NLRA), a strike is enjoinable only when it is over a grievance required to be arbitrated pursuant to a provision in the collective bargaining agreement. *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235 (1970). It is also true that under the NLRA, participation in a sympathy strike, which is not subject to arbitration under the collective bargaining agreement, cannot be enjoined *Buffalo Forge Co. v. United Steelworkers of Am.*, 428 U.S. 397 (1976). But, this is not an NLRA case. Under the RLA, prior to the exhaustion of the process, disputes are either "minor" and arbitrable under 45 U.S.C. § 153 or "major disputes" which include disputes over "changes in rates of pay, rules or working conditions" subject to mediation under 45 U.S.C. § 155 First (a) or "any other dispute" also subject to mediation under 45 U.S.C. § 155 First (b). "[F]rom the point of view of industrial relations our railroads are largely a thing apart . . . . The railroad world is like a state within a state." *Elgin J. & E. R.R. v. Burley*, 325 U.S. 711,

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[5] Defendants apparently have abandoned their position that any sympathetic action would relate not to a labor dispute but only to a political question. *Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n*, 457 U.S. 702 (1982).

751 (1945) (Frankfurter, J., dissenting). This is an RLA case where the duty to arbitrate minor disputes, 45 U.S.C. § 153, and mediate "changes in rates of pay rules and working conditions," 45 U.S.C. § 155 First (a), and "all other disputes," 45 U.S.C. § 155 First (b), arises by virtue of statute as opposed to being governed solely by the terms of the collective bargaining agreement. The statute, 45 U.S.C. § 152 First, makes it a "duty" of "carriers . . . and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay rules and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise. . . ." This RLA "duty" of the carrier and the union acting on behalf of employees is greater than the NLRA contractual obligation enunciated in *Buffalo Forge, supra.* The duty exists "to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof." 45 U.S.C. § 152 First. The words "any dispute" are not limited to any agreement between the carrier and employees but to any dispute between the carrier and its employees, whether contained in an agreement or not. Here, the parties dispute that there is a right of the employees to engage in a sympathy strike, slow down, refusal to cross picket lines, etc. Clearly such a strike or a slow down or other such concerted labor activity would interrupt "commerce" and plaintiffs' "operation." Thus, the primary object of Congress in enacting the RLA as set forth in 45 U.S.C. § 151a will be clearly frustrated if no injunctive action is taken.

There is precedent for sympathy strikes against carriers subject to the RLA to be enjoined. *Trans Int'l Airlines v. International Bhd. of Teamsters*, 650 F.2d 949 (9th Cir. 1980), *cert. denied*, 449 U.S. 1110 (1981); *Northwest Airlines, Inc. v. Air Line Pilots Ass'n Int'l*, 323 F. Supp. 107 (D. Minn. 1970), *aff'd*, 442 F.2d 251 (8th Cir.) (per curiam), *cert. denied*, 404 U.S. 871

(1971); *Trans World Airlines v. IAM*, 629 F. Supp. 1554, 1557 (W.D. Mo. 1986). There is also authority that sympathy strikes are neither minor nor major disputes under the RLA, *Eastern Air Lines v. Flight Eng'rs Int'l Ass'n*, 340 F.2d 104 (5th Cir. 1965). However, that court appears to have utilized the *Elgin* case, paraphrasing the definitions of "minor" and "major" disputes without resorting to the statutory language of 45 U.S.C. §§ 153 and 155 First (a) and (b).

Defendants argue also that absent defendants' right to honor the IAM picket lines by concerted action, the right of the IAM to picket has a reduced economic effect. Such a result, they say, was obviously not intended by *Burlington Northern*. This Court does not find the intent of the Supreme Court in that case obvious as it applies to the legality of concerted action by the employees who are the object of secondary picketing. Indeed, defendants' reading of *Jacksonville Terminal* and *Burlington Northern* as requiring the full application of the Norris La Guardia Act to RLA carriers when the arbitration and mediation process has not been exhausted, seems strained.

The defendants further contend that the right to engage in symapthy strikes or right to honor picket lines was always permitted in the past as inherent in the working relationship between Metro-North, LIRR and NJT and the respective defendants. If so, the factual dispute over that issue of the working relationship under the collective bargaining agreements should be arbitrated under the minor dispute mechanism of the RLA if the defendants decide it relates to the attendance requirements of the plaintiffs or mediated under 45 U.S.C. § 155 First (a) or (b) if the defendants decide the right has a broader scope.

Lastly the defendants contend that the underlying dispute here is not over a right to honor picket lines set up by a union which has a dispute with an employer in another industry, but a dispute between the IAM and

Eastern Air Lines in the person of Frank Lorenzo. They contend there is neither a dispute as to "pay, rules or working conditions" under § 152 First of the RLA nor a dispute over the formation of the collective agreement or efforts to secure them and that, accordingly, there is no dispute cognizable under the RLA. *See Eastern Air Lines v. Flight Eng'rs, supra.* Thus, they argue the Court is without jurisdiction due to the prohibitions of the Norris LaGuardia Act. The argument is also unpersuasive. It is based on the *Elgin* case's paraphrasing of the statute and not the statute itself. It also overlooks the overriding purpose of the RLA to prevent strikes and the dispute over the obligation to perform services under the collective bargaining agreements.

Accordingly, the Court finds that the plaintiffs' have shown a substantial likelihood of success on the merits of their actions insofar as they seek to prevent the contemplated concerted labor activity by the defendant union members who are employed by plaintiffs.

The Court concludes that plaintiffs' other contention that the Eastern IAM employees should also be enjoined from engaging in secondary picketing of the plaintiffs' premises does not have a likelihood of success on the merits. Plaintiffs contention is based on the language in the *Burlington Northern* decision approving secondary picketing with respect to picketing within the railway industry by a union that has exhausted the RLA settlement process. Plaintiffs would have this Court prevent picketing which crosses industry lines. Although plaintiffs' reading of *Burlington Northern* is accurate, it overlooks the fact that the *Burlington Northern* opinion determined the scope of permitted secondary picketing by reference to § 13(a) of the Norris LaGuardia Act, 29 U.S.C. § 113(a), which states that "a case shall be held to involve or grow out of a labor dispute when the case involves persons who were engaged in the same industry, trade, craft, or occupation." Thus, the statute under in-

terpretation by the Supreme Court in *Burlington Northern* is much broader in its scope than the plaintiffs suggest. Indeed, its language, "same . . . trade, craft or occupation," would directly apply to the members of IAM to permit their threatened secondary picketing. Accordingly, this Court will not enjoin such activities by IAM.

Irreparable Harm

The parties have stipulated that plaintiffs' operations will have to cease if the threatened picket lines of the IAM are honored. There is a substatnial likelihood that those picket lines will be honored absent an injunction. It is clear that such a cessation will cause immediate and irreparable harm in the form of substantial economic injuries [6] and the loss of good will by plaintiffs, not compensable in monetary damages. In addition, the public, over 400,000 persons, will suffer immediate and irreparable injury, both in substantial inconvenience and in loss of pay by those unable to get to work, with potential, but foreseeable, consequences, particularly for persons with modest income, of loss of jobs, rented housing, or items purchased on credit. The harm to defendants caused by the issuance of an injunction is far less. They will be denied their opportunity to express union solidarity by honoring another union's picket line and to assist another union in its lawful economic self-help activities, but they will be free to assist the IAM in other ways. The defendants also assert that an injunction along the lines of the temporary restraining order will limit their ability to prevent future union busting tactics by persons emulating Frank Lorenzo of Eastern Air Lines, and will deprive them of a means of seeking the intervention by the President or through legislation in Congress. Again, they may seek relief in other ways. Although a preliminary injunction will impinge on defendants' rights, it also prevents plaintiffs and the public from being made victims

[6] *E.g.*, Metro-North states its losses will be $1 million per day.

for that purpose. The harm imposed on defendants is far less than the immediate and irreparable damage which the plaintiffs and public will suffer if the injunction is not issued. Furthermore, in view of the testimony that, in some defendant unions, members have always observed picket lines without the need for instructions or encouragement, the injunction will require the defendants to instruct their members to report for work. The Court finds (1) a substantial likelihood that each plaintiff will succeed on the merits, and (2) a clear risk of immediate and irreparable injury to plaintiffs and the public. Even placing in balance the hardships to defendants, the harm to plaintiffs clearly outweigh any harm to defendants. Accordingly, a temporary injunction will issue restraining defendants from engaging in sympathy strikes, slowdowns, or other concerted labor activity, in connection with any picketing of plaintiffs by IAM's Eastern Air Lines members during the pendency of the Eastern Air Line/IAM strike.

The parties will settle an order on notice in three days. Until then the temporary restraining orders shall remain in effect.

SO ORDERED.

Dated: New York, New York
March 13, 1989
6:25 PM

ROBERT P. PATTERSON, JR.
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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89 Civ. 1536 (RPP)

THE LONG ISLAND RAIL ROAD COMPANY,
Plaintiff,

-against-

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS ("IAM") AFL-CIO, *et al.*,
Defendants.

PRELIMINARY INJUNCTION

This cause coming on to be heard on plaintiff's application for a Preliminary Injunction, and notice having been given to all concerned parties as provided by Rules 4(c) and 65, Federal Rules of Civil Procedure, pursuant to the Order dated March 5, 1989, the Court enters this Preliminary Injunction and it is therefore,

ORDERED that the Brotherhood of Locomotive Engineers; Brotherhood of Railroad Signalmen; International Association of Machinists and Aerospace Workers; International Brotherhood of Electrical Workers; International Brotherhood of Firemen & Oilers, National Transportation Supervisors Association; Sheet Metal Workers International Association; Transportation Communications Union; TCU-American Railway Supervisors Association; United Transportation Union; and UTU-Yardmasters Department (collectively the "defendant unions"), their officers, agents, representatives and the employees represented by them, and all those in active concert or participation with them who receive notice of the Order, and each of them, be enjoined and restrained

from in any manner calling, threatening, instigating, directing, encouraging, causing, assisting, participating or continuing in any strike, sympathy strike, work stoppage, slowdown, concerted refusal to cross a picket line, picketing, or any other interruption in the operation of the LIRR, by and among any of the LIRR's employees represented by the defendant unions. Nothing herein shall be construed to limit the IAM, its officers, agents, and representatives, from directing secondary picketing and other lawful strike activities by members of the IAM who are not LIRR employees.

IT IS FURTHER ORDERED, that the defendant unions, their officers, agents, representatives and the employees represented by them, and all those in active concert or participation with them who receive actual notice of the Order, direct all the LIRR's employees represented by the unions to report to work pursuant to their normal schedules, and to refrain from engaging in any strike, sympathy strike, work stoppage, showdown, concerted refusal to cross a picket line, picketing, or any other interruption to the operation of the LIRR, by and among any of the LIRR's employees represented by defendant unions, including:

a. rescinding and withdrawing any orders, directions, requests or suggestions previously issued by them or under their authority to employees of plaintiff that any such employees not report to work, honor picket lines at or near the LIRR's premises, trains, or places of business or refuse to perform their work duties for plaintiff.

b. post on all union bulletin boards maintaned on the LIRR's premises and property and at union offices, the following signed notice:

TO: All LIRR employees represented by [Union]

FROM: [Name of Union]

"No fine or penalties will be imposed on, or disciplinary proceedings initiated against, any

union member who crosses an IAM picket line. Any previous statement to the contrary is hereby cancelled, and employees are required to report to work pursuant to their normal schedules even if an IAM picket line is established.

[Name of Union]

By: _____

IT IS FURTHER ORDERED, that the defendant unions shall: (i) communicate the dictates of this Order to their representatives, agents, employees and members; (ii) take all affirmative steps necessary to prevent disruption of normal rail operations and to cause their agents, representatives, members and others acting in concert with them to comply with this Order; and (iii) in response to any inquiry from any member concerning the taking of any job-related action against the LIRR, such members shall be referred to this Order and told that he or she is expected by the union strictly to comply with its dictates.

IT IS FURTHER ORDERED, that all picket signs carried and all literature distributed by the IAM outside the premises of the LRR shall clearly identify the dispute as being between the IAM and Eastern Airlines, and not as being between the IAM and the LIRR.

And it is further ordered that this Preliminary Injunction Order is issued on the condition that the bond previously filed by the LIRR herein in the sum of $50,000 be maintained and that the defendants shall recover from the LIRR all costs and damages, if any, suffered by them in the event the LIRR does not succeed in this action.

This Order issued this 17th day of March, 1989.

ROBERT P. PATTERSON, JR.
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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89 Civ. 1535 (RPP)

METRO-NORTH COMMUTER RAILROAD COMPANY,
Plaintiff,

-against-

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS ("IAM") AFL-CIO, *et al.*,
Defendants.

PRELIMINARY INJUNCTION

This cause coming on to be heard on plaintiff's application for a Preliminary Injunction, and notice having been given to all concerned parties as provided by Rules 4(c) and 65, Federal Rules of Civil Procedure, pursuant to the Order dated March 5, 1989, the Court enters this Preliminary Injunction and it is therefore,

ORDERED that the American Railway Supervisors Association; American Train Dispatchers Association; Brotherhood of Railroad Signalmen; Brotherhood of Locomotive Engineers; International Association of Machinists and Aerospace Workers; International Brotherhood of Electrical Workers; Local 495, Hotel & Restaurant Employees Bartenders International Union; International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers; International Brotherhood of Firemen & Oilers; Local 808, International Brotherhood of Teamsters; Sheet Metal Workers International Association; Transport Workers Union of America; Local 1460, Transport Workers Union; Transporta-

tion Communications International Union; Transportation Communications International Union—TC Division; and United Transportation Union (collectively the "defendant unions"), their officers, agents, representatives and the employees represented by them, and all those in active concert or participation with them who receive notice of the Order, and each of them, be enjoined and restrained from in any manner calling, threatening, instigating, directing, encouraging, causing, assisting, participating or continuing in any strike, sympathy strike, work stoppage, slowdown, concerted refusal to cross a picket line, picketing, or any other interruption in the operation of Metro-North, by and among any of Metro-North's employees represented by the defendant unions. Nothing herein shall be construed to limit the IAM, its officers, agents, and representatives, from directing secondary picketing and other lawful strike activities by members of the IAM who are not Metro-North employees.

IT IS FURTHER ORDERED, that the defendant unions, their officers, agents, representatives and the employees represented by them, and all those in active concert or participation with them who receive actual notice of the Order, direct all Metro-North's employees represented by the unions to report to work pursuant to their normal schedules, and to refrain from engaging in any strike, sympathy strike, work stoppage, slowdown, concerted refusal to cross a picket line, picketing, or any other interruption to the operation of Metro-North, by and among any of Metro-North's employees represented by defendant unions, including:

a. rescinding and withdrawing any orders, directions, requests or suggestions previously issued by them or under their authority to employees of plaintiff that any such employees not report to work, honor picket lines at or near Metro-North's premises, trains, or places of business or refuse to perform their work duties for plaintiff.

b. post on all union bulletin boards maintained on Metro-North's premises and property and at union offices, the following signed notice:

TO: All Metro-North employees represented by [Union]

FROM: [Name of Union]

"No fine or penalties will be imposed on, or disciplinary proceedings initiated against, any union member who crosses an IAM picket line. Any previous statement to the contrary is hereby cancelled, and employees are required to report to work pursuant to their normal schedules even if an IAM picket line is established."

[Name of Union]

By: _____

IT IS FURTHER ORDERED, that the defendant unions shall: (i) communicate the dictates of this Order to their representatives, agents, employees and members; (ii) take all affirmative steps necessary to prevent disruption of normal rail operations and to cause their agents, representatives, members and others acting in concert with them to comply with this Order; and (iii) in response to any inquiry from any member concerning the taking of any job-related action against the LIRR, such members shall be referred to this Order and told that he or she is expected by the union strictly to comply with its dictates.

IT IS FURTHER ORDERED, that all picket signs carried and all literature distributed by the IAM outside the premises of Metro-North shall clearly identify the dispute as being between the IAM and Eastern Airlines, and not as being between the IAM and Metro-North.

And it is further ordered that this Preliminary Injunction Order is issued on the condition that the bond previously filed by the Metro-North herein in the sum of $50,000 be maintained and that the defendants shall recover from the Metro-North all costs and damages, if any, suffered by ~~them~~ in the event that the Metro-North does not succeed in this action.

This Order issued this 17th day of March, 1989.

ROBERT P. PATTERSON, JR.
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 89 CIV 1516 (RPP)

NJ TRANSIT RAIL OPERATIONS, INC., an instrumentality of the State of New Jersey,
Plaintiff,

v.

THE BROTHERHOOD OF RAILROAD SIGNALMEN, *et al.*,
Defendants.

PRELIMINARY INJUNCTION

This cause coming on to be heard on plaintiff's application for a Preliminary Injunction, and notice being given to all concerned parties as provided by Rules 4(c) and 65, Federal Rules of Civil Procedure, pursuant to the Order dated March 5, 1989, the Court enters this Preliminary injunction and it is therefore,

ORDERED, that the Brotherhood of Railroad Signalmen; American Train Dispatchers Ass'n; International Brotherhood of Firemen and Oilers, System Counsel No. 2; Brotherhood of Railway Carmen, a division of TCU; Brotherhood of Maintenance of Way Employees; International Association of Machinists & Aerospace Workers (IAM); International Brotherhood of Electrical Workers; Transport Workers Union; Transportation Communication International Union; International Brotherhood of Boilermakers, Ironship Builders, Blacksmiths, Forgers & Helpers; Brotherhood of Locomotive Engineers; American Railway & Airway Supervisors Association; United Transportation Union Railroad Yardmasters; Sheet Metal

Workers International Association; United Transportation Union (T); and United Transportation Union (E), their officers, agents, representatives and the employees represented by them, and all those in active concert or participation with them who receive notice of the Order, and each of them, be enjoined and restrained from in any manner calling, threatening, instigating, directing, encouraging, causing, assisting, participating or continuing in any strike, sympathy strike, work stoppage, slowdown, concerted refusal to cross a picket line, picketing, or any other interruption in the operation of NJTRO, by and among any employees of NJTRO represented by the defendant unions. Nothing herein shall be construed to limit the IAM, its officers, agents and representatives from directing secondary picketing or other lawful strike activities in connection with the IAM's strike against Eastern Airlines, by members of the IAM who are not employees of NJTRO.

IT IS FURTHER ORDERED, that the aforementioned defendant unions, their officers, agents, representatives and the employees represented by them, and all those in active concert or participation with them who receive actual notice of the Order, direct all employees of NJTRO who are represented by those unions to report to work pursuant to their normal schedules and to refrain from engaging in any strike, sympathy strike, work stoppage, slowdown, concerted refusal to cross a picket line, picketing, or any other interruption to the operation of NJTRO, by and among any of the NJTRO employees represented by defendant unions, including:

a. rescinding and withdrawing any orders, directions, requests or suggestions previously issued by them or under their authority to employees of plaintiff that any such employees not report to work, honor picket lines at or near NJTRO's premises, trains, or places of business or refuse to perform their work duties for plaintiff;

b. post on all union bulletin boards on NJTRO's premises and property and at each union's offices, the following signed notice:

TO: All NJTRO employees represented by [Union]

FROM: [Name of Union]

"No fine or penalties will be imposed on, or disciplinary proceedings initiated against, any union member who crosses an IAM picket line. Any previous statement to the contrary is hereby cancelled, and employees are required to report to work pursuant to their normal schedule even if an IAM picket line is established."

[Name of Union]

By: _____

IT IS FURTHER ORDERED, that the defendant unions shall; (i) communicate the dictates of this Order to their representatives, agents, employees and members; (ii) take all affirmative steps necessary to prevent disruption of normal rail operations and to cause their agents, representatives, members and others acting in concert with them to comply with this Order; and (iii) in response to any inquiry from any member concerning the taking of any job-related action against NJTRO, such members shall be referred to this Order and told that he or she is expected by the union strictly to comply with its dictates.

IT IS FURTHER ORDERED, that all picket signs carried and all literature distributed by the IAM outside the premises of NJTRO shall clearly identify the dispute as being between the IAM and Eastern Airlines, and not as being between the IAM and NJTRO.

And it is further ordered that this Preliminary Injunction Order is issued on the condition that the bond previ-

ously filed by NJTRO herein for the sum of $50,000 be maintained and that the defendants shall recover from NJTRO all costs and damages, if any, suffered by the defendants in the event NJTRO does not succeed in this action.

This Order issued this 17th day of March, 1989.

ROBERT P. PATTERSON, JR.
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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89 Civ. 1504 (RPP)

NATIONAL RAILROAD PASSENGER CORPORATION,
Plaintiff,

v.

AMERICAN RAILWAY AND AIRWAY
SUPERVISORS ASSOCIATION, *et al.*,
Defendants.

ORDER OF PRELIMINARY INJUNCTION

This cause coming on to be heard on the motion by plaintiff National Railroad Passenger Corporation ("Amtrak") for a preliminary injunction, and notice having been given to all concerned parties pursuant to Rules 4(c) and 65, Federal Rules of Civil Procedure, and defendants having submitted papers in opposition thereto, and this Court having conducted a hearing and received testimony on March 8 and 9, 1989, and this Court having issued an Opinion and Order, dated March 13, 1989, setting forth the Court's findings of fact and conclusions of law; now, therefore,

IT IS HEREBY ORDERED, that, pursuant to Rule 65 of the Federal Rules of Civil Procedure, effective during the pendency of this action, defendants American Railway and Airway Supervisors Association; F. Ferlin, Jr., President, American Railway and Airway Supervisors Association; A. A. D'Alessando, System General Chairman, American Railway and Airway Supervisors Association; J. N. Fountain, President and General Chairman (OBS)-Lodge 5093, American Railway and Airway

Supervisors Association; E. J. Gutowski, General Chairman (MW), American Railway and Airway Supervisors Association; Sherman E. Jennings, Vice President and Vice General Chairman, ARASA Lodge 5093, American Railway and Airway Supervisors Association; Amtrak Service Workers Council; J. M. Parker, Chairman, Amtrak Service Workers Council; E. Monroe, Vice Chairman, Amtrak Service Workers Council; J. Czuczman, Vice Chairman, Amtrak Service Workers Council; American Train Dispatchers Association; R. J. Irvin, President, American Train Dispatchers Association; W. A. Clifford, Vice President, American Train Dispatchers Association; R. A. Verdi, General Chairman, American Train Dispatchers Association; Brotherhood of Locomotive Engineers; L. D. McFather, President, Brotherhood of Locomotive Engineers; R. P. McLaughlin, First Vice President, Brotherhood of Locomotive Engineers; D. L. Lindsey, Vice President, Brotherhood of Locomotive Engineers; G. R. DeBolt, Vice President, Brotherhood of Locomotive Engineers; R. E. Wiggins, Acting General Chairman, Brotherhood of Locomotive Engineers; Brotherhood of Maintenance of Way Employees; G. N. Zeh, President, Brotherhood of Maintenance of Way Employees; W. E. LaRue, Vice President, Brotherhood of Maintenance of Way Employees; J. P. Cassese, Sr., General Chairman, Brotherhood of Maintenance of Way Employees; J. Dodd, General Chairman, Brotherhood of Maintenance of Way Employees; J. J. Davison, General Chairman, Brotherhood of Maintenance of Way Employees; Brotherhood of Railroad Signalman; V. M. Speakman, President, Brotherhood of Railroad Signalman; W. A. Radziewicz, Vice President, R. E. McKenzie, General Chairman, Brotherhood of Railroad Signalman; International Association of Machinists; W. Winpisinger, International President, International Association of Machinists; J. Peterpaul, General Vice President, International Association of Machinists; J. E. Burns, Jr., President and Directing General Chairman, International Associa-

tion of Machinists; E. B. Kostakis, President and Directing General Chairman, International Association of Machinists; International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers; Alan M. Scheer, International Representative, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers; C. W. Jones, International President, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers; International Brotherhood of Electrical Workers; John J. Barry, International President, International Brotherhood of Electrical Workers; E. P. McEntee, International Vice President, International Brotherhood of Electrical Workers; P. A. Puglia, General Chairman, International Brotherhood of Electrical Workers; J. A. McAteer, International Brotherhood of Electrical Workers; International Brotherhood of Firemen and Oilers; J. L. Waler, International President, International Brotherhood of Firemen and Oilers; G. J. Francisco, Jr., General Chairman and International Vice President, International Brotherhood of Firemen and Oilers; Joint Council of Carmen, Helpers, Coach Cleaners Apprentices; J. E. Allred, Vice President, Brotherhood of Railroad Carmen; J. Czuczman, Chairman, International Brotherhood of Firemen and Oilers; Railroad Yardmasters of America; J. C. Thomas, Vice President and General Chairman, Railroad Yardmasters of America; J. L. Roy, Assistant to President, Director, Railroad Yardmasters of America; Sheet Metal Workers, International Association; E. J. Carlough, International President, Sheet Metal Workers, International Association; D.C. Buchanan, Director of Railroads, Sheet Metal Workers, International Association; C. J. Welch, General Chairman, Sheet Metal Workers International Association; Transportation Communications Union; R. I. Kilroy, International President, Transportation Communications Union; R. A. Scardelletti, Transportation Communications Union, J. M. Parker, General Chairman, Transportation Communications Union; H. W. Randolph, Jr.,

General Chairman, Transportation Communications Union; United Transportation Union; F. A. Hardin, President, United Transportation Union; L. R. Davis, Vice President, United Transportation Union; W. A. Beebe, General Chairman, United Transportation Union; C. P. Jones, General Chairman, United Transportation Union; S. F. A. McGregor (Stewards), General Chairman, United Transportation Union; Larry J. Wotaszak, Vice President, United Transportation Union (collectively the "defendants"), their officers, agents, representatives, successors, and the Amtrak employees represented by them, and all those acting in concert or in participation with them who receive actual notice of this Order, be and they hereby are enjoined from calling, threatening, permitting, instigating, directing, supporting, defending, authorizing, encouraging, participating in, approving, assisting or continuing any strike, sympathy strike, slowdown, concerted refusal to work, concerted refusal to cross a picket line, picketing, interference with equipment, sick-out, work stoppage, or other concerted labor activity disruptive of Amtrak's normal rail operations. Nothing herein shall be construed to limit the International Association of Machinists ("IAM"), its officers, agents and representatives, from directing secondary picketing by members of the IAM who are not Amtrak employees.

AND IT IS FURTHER ORDERED, that the defendants, their officers, agents, representatives, successors, and the Amtrak employees represented by them, and all those acting in concert or in participation with them who receive actual notice of this Order, shall direct all Amtrak employees represented by the defendant labor organizations to report to work as usual and to refrain from engaging in any strike, sympathy strike, work stoppage, slowdown, concerted refusal to cross a picket line, picketing, concerted refusal to work, interference with equipment, sick-out or other concerted labor activity disrup-

tive of Amtrak's normal rail operations by and among any of Amtrak's employees represented by the defendant labor organizations and further shall:

a. rescind and withdraw any orders, directions, requests or suggestions previously issued by defendants or under their authority to employees of plaintiff Amtrak that any such employees not report to work, honor picket lines at or near Amtrak's premises, trains, or places of business or refuse to perform their work duties for plaintiff Amtrak;

b. post on all defendant labor organization bulletin boards maintained on Amtrak's premises or property and at all defendant labor organization offices, the following signed notice:

> To: All Amtrak employees represented by [Labor Organization]
>
> From: [Name of Labor Organization]
>
> No fine or penalties will be imposed on or disciplinary proceedings initiated against any union members who cross an IAM picket line. Any previous statement to the contrary is hereby cancelled and employees are requested to report to work as usual even if an IAM picket line is established.
>
> [Name of Labor Organization]
>
> By: _____

IT IS FURTHER ORDERED, that the defendant labor organizations shall communicate the dictates of this Order to their representatives, agents, employees and members, and shall take all affirmative steps necessary to prevent disruption of Amtrak's normal rail operations and to cause their agents, representatives, members and

others acting in concert with them to comply with this Order, and in response to any inquiry from any member concerning the taking of any job-related action against Amtrak, such members shall be referred to this Order and told that he or she is expected by the labor organization strictly to comply with its dictates.

AND IT IS FURTHER ORDERED, that all literature distributed or displayed by the IAM outside the premises or property of plaintiff Amtrak shall clearly identify the dispute as being between the IAM and Eastern Air Lines, and not as being between the IAM and Amtrak.

AND IT IS FURTHER ORDERED, that this Preliminary Injunction Order is issued on the condition that the bond previously filed by Amtrak herein in the sum of $50,000 be maintained and that the defendants shall recover from Amtrak under the bond all costs and damages, if any, suffered by them in the event that Amtrak does not succeed in this action.

Dated: New York, New York
March 17, 1989

ROBERT P. PATTERSON, JR.
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MANDATE

[Filed April 10, 1989]

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the tenth day of April one thousand nine hundred and eighty-nine.

Present: HON. JAMES L. OAKES

HON. AMALYA L. KEARSE

HON. J. DANIEL MAHONEY
Circuit Judges,

Docket Nos. 89-7297,
89-7299, 89-7301, 89-7303

THE LONG ISLAND RAILROAD COMPANY,
Plaintiff-Appellee,

—v.—

INTERNATIONAL ASSOCIATION OF MACHINISTS; THOMAS LAVECCHIA, INDIVIDUALLY AND AS LOCAL CHAIRMAN OF IAM; BROTHERHOOD OF LOCOMOTIVE ENGINEERS; JOSEPH A. CASSIDY, JR., INDIVIDUALLY AND AS GENERAL CHAIRMAN OF BLE; BROTHERHOOD OF RAILROAD SIGNALMEN; ROBERT A. WAIDLER, INDIVIDUALLY AND AS GENERAL CHAIRMAN OF BRS; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; JOHN A. CAGGIANO, INDIVIDUALLY AND AS BUSINESS MANAGER OF IBEW;

INTERNATIONAL BROTHERHOOD OF FIREMEN & OILERS; PHILIP A. MAZZOLA, INDIVIDUALLY AND AS GENERAL CHAIRMAN OF IBF&O; NATIONAL TRANSPORTATION SUPERVISORS ASSOCIATION; THOMAS T. ROGERS, INDIVIDUALLY AND AS GENERAL CHAIRMAN & PRESIDENT OF NTSA; SHEET METAL WORKERS INTERNATIONAL ASSOCIATION; GREGORY WENCHELL, INDIVIDUALLY AND AS LOCAL CHAIRMAN OF SMWIA; TRANSPORTATION COMMUNICATIONS UNION; EDWARD A. HANLEY, JR., INDIVIDUALLY AND AS GENERAL CHAIRMAN OF TCU; TCU-AMERICAN RAILWAY SUPERVISORS ASSOCIATION; ANTHONY M. ORIOLES, INDIVIDUALLY AND AS GENERAL CHAIRMAN OF TCU-ARSA; UNITED TRANSPORTATION UNION; EDWARD YULE, JR., INDIVIDUALLY AND AS GENERAL CHAIRMAN OF UTU; UTU-YARDMASTERS DEPARTMENT; P. TRAMONTANO, INDIVIDUALLY AND AS GENERAL CHAIRMAN OF UTU-YARDMASTERS DEPT.,

Defendants-Appellants.

METRO-NORTH COMMUTER RAILROAD COMPANY,

Plaintiff-Appellee,

—v.—

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS ("IAM"), W.F. MITCHELL, INDIVIDUALLY AND AS GENERAL CHAIRMAN OF THE IAM, AMERICAN RAILWAY SUPERVISORS ASSOCIATION ("ARSA"), JAMES D. KELLY, INDIVIDUALLY AND AS GENERAL CHAIRMAN OF ARSA, DONALD L. REYNOLDS, INDIVIDUALLY AND AS GENERAL CHAIRMAN OF ARSA, AMERICAN TRAIN DISPATCHERS ASSOCIATION ("ATDA") REPRESENTING TRAIN DISPATCHERS AND POWER SUPERVISORS, T.J. RINGWOOD, INDIVIDUALLY AND AS GENERAL CHAIRMAN OF THE ATDA, JOHN KROLL, INDIVIDUALLY AND AS GENERAL CHAIRMAN OF THE ATDA, BROTHERHOOD OF RAILROAD SIGNALMEN ("BRS"), R.E. MCKENZIE, INDIVIDUALLY AND AS GENERAL CHAIRMAN OF

THE BRS, BROTHERHOOD OF LOCOMOTIVE ENGINEERS ("BLE"), R.W. GODWIN, INDIVIDUALLY AND AS GENERAL CHAIRMAN OF THE BLE, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS ("IBEW"), REPRESENTING ELECTRICIANS, COMMUNICATION WORKERS AND ELECTRIC TRACTION WORKERS, PETER A. PUGLIA, INDIVIDUALLY AND AS GENERAL CHAIRMAN OF THE IBEW, LOCAL 495, HOTEL & RESTAURANT EMPLOYEES BARTENDERS INTERNATIONAL UNION, DELENOW BROADUS, INDIVIDUALLY AND AS GENERAL CHAIRMAN OF LOCAL 495, INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS ("IBB"), GARY CALIENDO, INDIVIDUALLY AND AS LOCAL CHAIRMAN OF IBB, INTERNATIONAL BROTHERHOOD OF FIREMEN & OILERS ("IBF&O"), GEORGE FRANCISCO, JR., INDIVIDUALLY AND AS GENERAL CHAIRMAN & INTERNATIONAL VICE PRESIDENT OF THE IBF&O, LOCAL 808, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, NICK DELICIO, INDIVIDUALLY AND AS PRESIDENT OF LOCAL 808, SHEETMETAL WORKERS INTERNATIONAL ASSOCIATION ("SHEETMETAL WORKERS"), CARLTON J. WELSCH, INDIVIDUALLY AND AS GENERAL CHAIRMAN OF THE SHEETMETAL WORKERS, TRANSPORT WORKERS UNION OF AMERICA ("TWU"), TIMOTHY GRANDFIELD, INDIVIDUALLY AND AS INTERNATIONAL PRESIDENT OF TWU, LOCAL 1460, TRANSPORT WORKERS UNION, J.M. MCGRATH, INDIVIDUALLY AND AS PRESIDENT OF LOCAL 1460, TRANSPORTATION COMMUNICATION INTERNATIONAL UNION ("TCIU"), HOWARD W. RANDOLPH, JR., INDIVIDUALLY AND AS GENERAL CHAIRMAN OF THE TCIU, TRANSPORTATION COMMUNICATION INTERNATIONAL UNION ("TCIU") TC DIVISION, R.H. BARNARD, INDIVIDUALLY AND AS VICE GENERAL CHAIRMAN OF THE TCIU, UNITED TRANSPORTATION UNION ("UTU") REPRESENTING CONDUCTORS & TRAINMEN, ENGINEERS AND YARDMASTERS, JAMES D. PHELAN, INDIVIDUALLY AND AS GENERAL CHAIRMAN OF THE UTU, W.A. WODOWSKI, INDIVIDUALLY AND AS GENERAL CHAIRMAN OF THE

UTU, P.G. TRAMONTANO, INDIVIDUALLY AND AS GENERAL CHAIRMAN OF THE UTU, AND ALL OTHERS ACTING IN CONCERT WITH THE ARSA, ATDA, BRS, BLE, IBEW, LOCAL 495, IBB, IBF&O, LOCAL 808, PBA, SHEETMETAL WORKERS, TWU, LOCAL 1460, TCIU, TCIU-TC DIVISION AND THE UTU,

Defendants-Appellants.

NJ TRANSIT RAIL OPERATIONS, INC., AN INSTRUMENTALITY OF THE STATE OF NEW JERSEY,

Plaintiff-Appellee,

—v.—

THE BROTHERHOOD OF RAILROAD SIGNALMEN, AN UNINCORPORATED ASSOCIATION, AND ROLAND E. MCKENZIE, INDIVIDUALLY AND AS GENERAL CHAIRMAN OF THE BROTHERHOOD; THE AMERICAN TRAIN DISPATCHERS ASS'N, AN UNINCORPORATED ASSOCIATION, AND S.S. SHERMAN AND GEORGE BURKE, INDIVIDUALLY AND AS GENERAL CHAIRMAN OF THE ASSOCIATION; THE INTERNATIONAL BROTHERHOOD OF FIREMEN AND OILERS, SYSTEM COUNSEL NO. 2, AN UNINCORPORATED ASSOCIATION, AND GEORGE J. FRANCISCO, INDIVIDUALLY AND AS GENERAL CHAIRMAN OF THE BROTHERHOOD; THE BROTHERHOOD OF RAILWAY CARMEN, A DIVISION OF TCU, AN UNINCORPORATED ASSOCIATION, AND JAMES PARRY, INDIVIDUALLY AND AS GENERAL CHAIRMAN OF THE BROTHERHOOD; THE BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, AN UNINCORPORATED ASSOCIATION, AND LEONARD ALLEN, INDIVIDUALLY AND AS GENERAL CHAIRMAN OF THE BROTHERHOOD; THE INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AN UNINCORPORATED ASSOCIATION, AND CHARLES C. ARTHUR, JR., INDIVIDUALLY AND AS GENERAL CHAIRMAN OF THE ASSOCIATION; THE INTERNATIONAL

BROTHERHOOD OF ELECTRICAL WORKERS, AN UNINCORPORATED ASSOCIATION, AND P.A. PUGLIA, INDIVIDUALLY AND AS GENERAL CHAIRMAN OF THE BROTHERHOOD; THE TRANSPORT WORKERS UNION, AN UNINCORPORATED ASSOCIATION, AND TOM MCADAM, INDIVIDUALLY AND AS GENERAL CHAIRMAN OF THE UNION; THE TRANSPORTATION COMMUNICATION INTERNATIONAL UNION, AN UNINCORPORATED ASSOCIATION, AND HOWARD W. RANDOLPH, JR., INDIVIDUALLY AND AS GENERAL CHAIRMAN OF THE UNION; THE INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRONSHIP BUILDERS, BLACKSMITHS, FORGERS & HELPERS, AN UNINCORPORATED ASSOCIATION, AND ALAN M. SCHEER, INDIVIDUALLY AND AS GENERAL CHAIRMAN OF THE BROTHERHOOD; THE BROTHERHOOD OF LOCOMOTIVE ENGINEERS, AN UNINCORPORATED ASSOCIATION, AND D.T. ABBOTT, INDIVIDUALLY AND AS GENERAL CHAIRMAN OF THE BROTHERHOOD,

Defendants-Appellants.

NATIONAL RAILROAD PASSENGER CORPORATION,
400 N. Capital Street, N.W., Washington, D.C. 20001,
Plaintiff-Appellee,

—v.—

AMERICAN RAILWAY & AIRWAY SUPERVISORS ASSOCIATION,
3 Research Place, Rockville, MD 20850,

—and—

F. Ferlin, Jr., President, AMERICAN RAILWAY AND AIRWAY SUPERVISORS ASSOCIATION, 3 Research Place, Rockville, MD 20850,

—and—

A.A. D'Allesandso, System General Chairman, AMERICAN RAILWAY AND AIRWAY SUPERVISORS ASSOCIATION, 2477-B Napfle, Philadelphia, PA 19152,

—and—

J.N. Fountain, President and General Chairman (OBS)-Lodge 5093, AMERICAN RAILWAY AND AIRWAY SUPERVISORS ASSOCIATION, 641 West Elder Street, Fallbrook, CA 92028,

—and—

E.J. Gutowski, General Chairman (MW), AMERICAN RAILWAY AND AIRWAY SUPERVISORS ASSOCIATION, 1946 Stanhope Road, Baltimore, MD 21222,

—and—

Sherman E. Jennings, Vice President and Vice General Chairman, ARASA Lodge 5093, AMERICAN RAILWAY AND AIRWAY SUPERVISORS ASSOCIATION, 9209 South State Street, Chicago, IL 60619,

—and—

AMTRAK SERVICE WORKERS COUNCIL,
3 Research Place, Rockville, Maryland 20850,

—and—

J.M. Parker, Chairman,
AMTRAK SERVICE WORKERS COUNCIL,
3 Research Place, Rockville, MD 20850,

—and—

E. Monroe, Vice Chairman, AMTRAK SERVICE WORKERS COUNCIL, 1130 S. Wabash Avenue, Suite 405, Chicago, IL 60605,

—and—

J. Czuczman, Vice Chairman, AMTRAK SERVICE WORKERS COUNCIL, 80 West End Avenue, New York, NY 10023,

—and—

AMERICAN TRAIN DISPATCHERS ASSOCIATION,
1401 South Harlem Avenue, Berwyn, IL 60402,

—and—

R.J. IRVIN, President, AMERICAN TRAIN DISPATCHERS ASSOCIATION, 1401 South Harlem Avenue, Berwyn, IL 60402,

—and—

W.A. Clifford, Vice President, AMERICAN TRAIN DISPATCHERS ASSOCIATION, 510-515 Revere Beach Blvd., Seaview Towers Unit #806, Revere, MA 02151,

—and—

R.A. Verdi, General Chairman, AMERICAN TRAIN DISPATCHERS ASSOCIATION, P.O. Box 30, Thornton, PA 19373,

—and—

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
1365 Ontario Street, 1110 Engineers Building,
Cleveland, OH 44114,

—and—

L.D. McFather, President, BROTHERHOOD OF LOCOMOTIVE ENGINEERS, 1365 Ontario Street, 1110 Engineers Building, Cleveland, OH 44114,

—and—

R.P. McLaughlin, First Vice President, BROTHERHOOD OF LOCOMOTIVE ENGINEERS, 1110 Engineers Building, Cleveland, OH 44114,

—and—

D.L. Lindsey, Vice President, BROTHERHOOD OF LOCOMOTIVE ENGINEERS, 400 First Street, N.W., Room 819, Washington, D.C. 20001,

—and—

G.R. DeBolt, Vice President, BROTHERHOOD OF LOCOMOTIVE ENGINEERS, 16651 88th Avenue, Orland Park, IL 60462,

—and—

R.E. Wiggins, Acting General Chairman, BROTHERHOOD OF LOCOMOTIVE ENGINEERS, The Craddock Professional Bldg., 146 Route 130, Bordentown, NJ 08505,

—and—

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, 12050 Woodward Avenue, Detroit, MI 48203,

—and—

G.N. Zeh, President, BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, 12050 Woodward Avenue, Detroit, MI 48203,

—and—

W.E. LaRue, Vice President, BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, 106 Brandywine Avenue, 2nd Floor, Downingtown, PA 19335,

—and—

J.P. Cassese, Sr., General Chairman, BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, 1165 Marlkress Road, Suite B, Cherry Hill, NJ 08033,

—and—

J. Dodd, General Chairman, BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, Carlton House—Suite 303, 1819 John F. Kennedy Blvd., Philadelphia, PA 19103,

—and—

J.J. Davison, General Chairman, BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, 450 Chauncy Street, Mansfield, MA 02048,

—and—

BROTHERHOOD OF RAILROAD SIGNALMAN, Railway Labor Building, Suite 708, 400 First Street, N.W., Washington, D.C. 20001,

—and—

V.M. Speakman, President,
BROTHERHOOD OF RAILROAD SIGNALMAN,
P.O. Box U, Mt. Prospect, IL 60056,

—and—

W.A. Radziewicz, Vice President, Railway Labor Building, Suite 708, 400 First Street, N.W., Washington, D.C. 20001,

—and—

R.E. McKenzie, General Chairman, BROTHERHOOD OF RAILROAD SIGNALMAN, United General Committee, Griest Building, Suite 508, 8 North Queen Street, Lancaster, PA 17603,

—and—

INTERNATIONAL ASSOCIATION OF MACHINISTS,
1300 Connecticut Avenue, N.W.,
Washington, D.C. 20036,

—and—

W. Winpisinger, International President, INTERNATIONAL ASSOCIATION OF MACHINISTS, 1300 Connecticut Avenue, N.W., Washington, D.C. 20036,

—and—

J. Peterpaul, General Vice President, INTERNATIONAL ASSOCIATION OF MACHINISTS, 1300 Connecticut Avenue, Washington, D.C. 20036,

—and—

J.E. Burns, Jr., President and Directing General Chairman, INTERNATIONAL ASSOCIATION OF MACHINISTS, P.O. Box 4324, Hamden, CT 06514,

—and—

E.B. Kostakis President and Directing General Chairman, INTERNATIONAL ASSOCIATION OF MACHINISTS, 729 Sunrise Avenue, Suite 202, Roseville, CA 95678,

—and—

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, 570 New Brotherhood Building, Kansas City, KS 66101,

—and—

Mr. Alan M. Scheer, International Representative, INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, Route 9-Box 90, Ringgold, Georgia 30736,

—and—

C.W. Jones, International President, INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, 570 New Brotherhood Building, Kansas City, KS 66101,

—and—

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, 10400 W. Higgins Road, Suite 100, Rosemont, IL 60018,

—and—

John J. Barry, International President, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, 1125 15th Street, N.W., Washington, D.C. 20005,

—and—

E.P. McEntee, International Vice President, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, 10400 W. Higgins Road, Suite 100, Rosemont, IL 60018,

—and—

P.A. Puglia, General Chairman, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, 1015 Chestnut Street, Room 515, Philadelphia, PA 19107,

—and—

J.A. McAteer, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, International Representative, 44 Greenback Road, Perryville, MD 21903,

—and—

INTERNATIONAL BROTHERHOOD OF FIREMEN AND OILERS, 122C Street, N.W., Suite 280, Washington, D.C. 20001,

—and—

J.L. Walker, International President, INTERNATIONAL BROTHERHOOD OF FIREMEN AND OILERS, 122C Street, N.W., Suite 280, Washington, D.C. 20001,

—and—

G.J. Francisco, Jr., General Chairman and International Vice President, INTERNATIONAL BROTHERHOOD OF FIREMEN AND OILERS, P.O. Box 657, Medford, NJ 08055,

—and—

JOINT COUNCIL OF CARMEN, HELPERS, COACH CLEANERS APPRENTICES, 820 Railway Labor Building, 400 First Street, N.W., Washington, D.C. 20001,

—and—

J.E. Allred, Vice President, BROTHERHOOD OF RAILROAD CARMEN, 820 Railway Labor Building, 400 First Street, N.W., Washington, D.C. 20001,

—and—

J. Czuczman, Chairman, INTERNATIONAL BROTHERHOOD OF FIREMEN AND OILERS, 80 West End Avenue, New York, NY 10023,

—and—

RAILROAD YARDMASTERS OF AMERICA, 1069 Mississippi Avenue, Pittsburgh, PA 15216,

—and—

J.C. THOMAS, Vice President & General Chairman, RAILROAD YARDMASTERS OF AMERICA, 1069 Mississippi Avenue, Pittsburgh, PA 15216,

—and—

J.L. Roy, Assistant to President, Director, RAILROAD YARDMASTERS OF AMERICA, 14600 Detroit Avenue, Cleveland, OH 44107,

—and—

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, 1750 New York Avenue, N.W., Washington, D.C. 20006,

—and—

E.J. Carlough, International President, SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, 1750 New York Avenue, N.W., Washington, D.C. 20006,

—and—

D.C. Buchanan, Director of Railroads, SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, 1750 New York Avenue, N.W., Washington, D.C. 20006,

—and—

C.J. Welch, General Chairman, SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, 11 Leonard Street, Mansfield, MA 01048,

—and—

TRANSPORTATION COMMUNICATIONS UNION, 3 Research Place, Rockville, MD 20850,

—and—

R.I. Kilroy, International President, TRANSPORTATION COMMUNICATIONS UNION, 3 Research Place, Rockville, MD 20850,

—and—

R.A. Scardelletti, TRANSPORTATION COMMUNICATIONS UNION, International Vice President, 3 Research Place, Rockville, MD 20850,

—and—

J.M. Parker, General Chairman, TRANSPORTATION COMMUNICATIONS UNION, 3 Research Place, Rockville, MD 20850,

—and—

H.W. Randolph, Jr., General Chairman, TRANSPORTATION COMMUNICATIONS UNION, 1522 Locust Street, Philadelphia, PA 19102,

—and—

UNITED TRANSPORTATION UNION,
14600 Detroit Avenue, Cleveland, OH 44107-4250,

—and—

F.A. Hardin, President,
UNITED TRANSPORTATION UNION,
14600 Detroit Avenue, Cleveland, OH 44107-4250,

—and—

L.R. Davis, Vice President, UNITED TRANSPORTATION UNION, 801 Bradford Terrace, West Chester, PA 19382,

—and—

W.A. Beebe, General Chairman, UNITED TRANSPORTATION UNION, 47 College Plaza, Room 227, New Haven, CT 06510,

—and—

C.P. Jones, General Chairman, UNITED TRANSPORTATION UNION, Three Penn Center Plaza, Suite 1422, Philadelphia, PA 19102,

—and—

S.F.A. McGregor (Stewards), General Chairman, UNITED TRANSPORTATION UNION, 5035 South Drexel, Townhouse M, Chicago, IL 60615,

—and—

Larry J. Wotaszak, Vice President, UNITED TRANSPORTATION UNION, 105 Danor Court (Chesterbrook), Wayne, PA 19087,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the orders of said District Court be an they hereby are modified and, as modified, affirmed in accordance with the opinion of this court. The Unions motion for a Stay of said orders pending appeal is denied.

The motion for consolidation of the appeals is granted, as is the motion to allow filing of memorandum in excess of ten pages, in support of the Stay motion.

ELAINE B. GOLDSMITH
Clerk

By: /s/ Edward J. Guardaro
EDWARD J. GUARDARO
Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 16th day of May, one thousand nine hundred and Eighty-nine

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Docket Number
89-7297
89-7299
89-7301
89-7303

THE LONG ISLAND RAILROAD CO., *et al.*,
Plaintiff-Appellees,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, *et al.*
Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by defendants-appellants, International Association of Machinists and Aerospace Workers, Et. Al.,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith
ELAINE B. GOLDSMITH
Clerk

APPENDIX E

SUPREME COURT OF THE UNITED STATES

No. A-89

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, *et al.*,
Petitioners

v.

LONG ISLAND RAILROAD, *et al.*

ORDER

UPON CONSIDERATION of the application of counsel for the petitioners,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including September 13, 1989.

/s/ Thurgood Marshall
Associate Justice of the Supreme Court of the United States

Dated this 2nd day of August, 1989.

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 89-5229

EASTERN AIR LINES, INC.,
Plaintiff-Appellant,

-versus-

AIR LINES PILOTS ASSOCIATION, INTERNATIONAL,
HENRY DUFFY, International President,
EASTERN MASTER EXECUTIVE COUNCIL,
JOHN J. DAVIS, Chairman,
EASTERN MEC,
JANE DOE and JOHN DOE,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

[Filed March 24, 1989]

Before TJOFLAT, ANDERSON and EDMONDSON, Circuit Judges.

BY THE COURT:

This is an appeal from a denial of a preliminary injunction. Whether injunctive relief is available in this case depends on various sections of the Railway Labor Act ("RLA"), 45 U.S.C. secs. 151 *et seq.* Therefore, the federal courts have federal question jurisdiction under 28 U.S.C. secs. 1331 and 1337.

Unambiguous violations of the RLA can be enjoined in federal court. *Burlington N. R.R. v. B.M.W.E.*, 107 S.Ct. 1841 (1987). Under the RLA, major disputes[1] trigger a status quo obligation. The status quo requirement prevents "the union from striking and management from doing anything that would justify a strike." *Detroit & Toledo S. L. R. v. United Transp. U.*, 396 U.S. 142, 150, 90 S.Ct. 294, 299 (1969). Eastern Airlines and ALPA are now in a major dispute about the provisions of ALPA's next contract. IAM, another union, is lawfully on strike against Eastern; and ALPA claims to be engaged in a sympathy strike supporting IAM's strike. Ordinarily, it is lawful to honor picket lines, and the RLA does not unambiguously preclude sympathy strikes. *See generally Eastern Air Lines v. Flight Engineers*, 340 F.2d 104 (5th Cir. 1965) (strikes that do not relate to major or minor dispute with employer are not violative of RLA). Nevertheless, a claim of sympathy strike cannot be used as a pretext to shield conduct that otherwise would be a clear violation of the RLA. So, if a sympathy strike is a pretext for self-help, the strike violates the RLA; the pretext may be disregarded; and the self-help strike may be enjoined.

The district court made no findings of fact on pretext. Because the district court declined to make the necessary

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[1] For RLA purposes, a "major" dispute relates to changes affecting rates of pay, rules or working conditions. "Minor" disputes require the interpretation of an existing collective bargaining agreement.

finding of fact about pretext, we VACATE its order and REMAND for the limited purpose of conducting further proceedings to make findings of fact on the pretext issue.[2] In the interest of judicial economy, we retain jurisdiction over the appeal. The district court shall promptly certify its findings to this court.

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[2] ALPA is not on strike over whether its strike is permitted by ALPA's present contract with Eastern; thus, the strike is not over a minor dispute under the RLA. Accordingly, an injunction cannot be warranted on this ground. *See Jacksonville Bulk Terminals v. Intern. Longshoremen's Ass'n*, 457 U.S. 702, 102 S.Ct. 2672 (1987) (a National Labor Relations Act case). It is proper to look to NLRA cases for help in construing the RLA. *Brotherhood of R.R. Tr. v. Jacksonville Term. Co.*, 394 U.S. 369, 383, 89 S.Ct. 1109, 1118 (1969).

APPENDIX G

Petitioners are the following unions and union officers representing the employees of Respondents:

International Association of Machinists & Aerospace Workers, ("IAM")

W.F. Mitchell, individually and as General Chairman of the IAM, American Railway Supervisors Association ("ARSA")

James D. Kelly, individually and as General Chairman of ARSA

Donald L. Reynolds, individually and as General Chairman of ARSA

American Train Dispatchers Association ("ATDA") representing Train Dispatchers and Power Supervisors

T.J. Ringwood, individually and as General Chairman of the ATDA

John Kroll, individually and as General Chairman of the ATDA

Brotherhood of Railroad Signalmen ("BRS")

R.E. McKenzie, individually and as General Chairman of the BRS

Brotherhood of Locomotive Engineers ("BLE")

R.W. Godwin, individually and as General Chairman of the BLE

International Brotherhood of Electrical Workers ("IBEW"), representing Electricians, Communication Workers and Electric Traction Workers

Peter A. Puglia, individually and as General Chairman of the IBEW

Local 495, Hotel & Restaurant Employees Bartenders International Union

Delenow Broadus, individually and as General Chairman of Local 495

International Brotherhood of Boilermakers, Iron Ship Builders Blacksmiths, Forgers and Helpers ("IBB")

Gary Caliendo, individually and as Local Chairman of IBB

International Brotherhood of Firemen & Oilers ("IBF&O")

George Francisco, Jr., individually and as General Chairman & International Vice President of the IBF&O

Local 808, International Brotherhood of Teamsters

Nick Delicio, individually and as President of Local 808 Sheetmetal Workers International Association ("SMWIA")

Carlton J. Welsch, individually and as General Chairman of the SMWIA

Transport Workers Union of America ("TWU")

Timothy Grandfield, individually and as International President of the TWU

Local 1460, Transport Workers Union

J.M. McGrath, individually and as President of Local 1460

Transportation Communication International Union ("TCU")

Howard W. Randolph, Jr., individually and as General Chairman of the TCU

Transportation Communication International Union ("TCU") TC Division

R.H. Barnard, individually and as Vice General Chairman of the TCU

United Transportation Union ("UTU") representing Conductors & Trainmen, Engineers and Yardmasters

James D. Phelan, individually and as General Chairman of the UTU

W.A. Wodowski, individually and as General Chairman of the UTU

P.G. Tramontano, individually and as General Chairman of the UTU

Thomas LaVecchia, individually and as Local Chairman of IAM

Joseph A. Cassidy, Jr., individually and as General Chairman of BLE

Robert A. Waidler, individually and as General Chairman of BRS

John A. Caggiano, individually and as Business Manager of IBEW

Philip A. Mazzola, individually and as General Chairman of IBF&O

National Transportation Supervisors Association

Thomas T. Rogers, individually and as General Chairman & President of NTSA

Gregory Wenchell, individually and as Local Chairman of SMWIA

Edward A. Hanley, Jr., individually and as General Chairman of TCU

Anthony M. Orioles, individually and as General Chairman of ARSA

Edward Yule, Jr., individually and as General Chairman of UTU

UTU-Yardmasters Department

S.S. Sherman and George Burke, individually and as General Chairmen of the ATDA

The International Brotherhood of Firemen and Oilers, System Counsel No. 2

The Brotherhood of Railway Carmen, a Division of TCU, an unincorporated association, and James Parry, individually and as General Chairman of the Brotherhood

The Brotherhood of Maintenance of Way Employees, an unincorporated association, and Leonard Allen, individually and as General Chairman of the Brotherhood

Charles C. Arthur, Jr., individually and as General Chairman of the IAM

The Transport Workers Union, an unincorporated association, and Tom McAdam, individually and as General Chairman of the Union

Alan M. Scheer, individually and as General Chairman of IBB

D.T. Abbott, individually and as General Chairman of BLE

Edward Snyder, individually and as Executive Vice President of ARSA

United Transportation Union (T), an unincorporated association, and Dan J. Bogan, individually and as General Chairman of the Union

United Transportation Union (E), an unincorporated association, and R.M. Belle, individually and as General Chairman of the Union

Policemen Benevolent Assoc., an unincorporated association, and John Napolitano, individually and as President of the Association

F. Ferlin, Jr., President, ARSA

A. A. D'Alessandro, System General Chairman, ARSA

J. N. Fountain, President and General Chairman, (OBS)—Lodge 5093, ARSA

E. J. Gutowski, General Chairman (MW), ARSA

Sherman E. Jennings, Vice President and Vice General Chairman, ARASA Lodge 5093

Amtrak Service Workers Council

J. M. Parker, Chairman, Amtrak Service Workers Council

E. Monroe, Vice Chairman, Amtrak Service Workers Council

J. Czuczman, Vice Chairman, Amtrak Service Workers Council

R. J. Irvin, President, ATDA

W. A. Clifford, Vice President, ATDA

R. A. Verdi, General Chairman, ATDA

L. D. McFather, President, BLE

R. P. McLaughlin, First Vice President, BLE

D. L. Lindsey, Vice President, BLE

G. R. DeBolt, Vice President, BLE

R. E. Wiggins, Acting General Chairman, BLE

G. N. Zeh, President, BMWE

W. E. LaRue, Vice President, BMWE

J. P. Cassese, Sr., General Chairman, BMWE

J. Dodd, General Chairman, BMWE

J. J. Davison, General Chairman, BMWE

V. M. Speakman, President, BRS

W. A. Radziewicz, Vice President, BRS

W. Winpisinger, International President, IAM

J. Peterpaul, General Vice President, IAM

J. E. Burns, Jr., President and Directing General Chairman, IAM

E. B. Kostakis, President and Directing General Chairman, IAM

C. W. Jones, International President, IBB

John J. Barry, International President, IBEW

E. P. McEntee, International Vice President, IBEW

J. A. McAteer, IBEW

J. L. Walker, International President, IBF&O

Joint Council of Carmen, Helpers, Coach Cleaners Apprentices

J. E. Allred, Vice President, Brotherhood of Railroad Carmen

J. Czuczman, Chairman, IBF&O

Railroad Yardmasters of America

J. C. Thomas, Vice President & General Chairman, Railroad Yardmasters of America

J. L. Roy, Assistant to President, Director, Railroad Yardmasters of America

E. J. Carlough, International President, SMWIA

D. C. Buchanan, Director of Railroads, SMWIA

R. I. Kilroy, International President, TCU

R. A. Scardelletti, TCU

J. M. Parker, General Chairman, TCU

F. A. Hardin, President, UTU

L. R. Davis, Vice President, UTU

W. A. Beebe, General Chairman, UTU

C. P. Jones, General Chairman, UTU

S. F. A. McGregor (Stewards) General Chairman, UTU

Larry J. Wotaszak, Vice President, UTU

Respondents are the following railroads:

The Long Island Railroad Company, Metro-North Commuter Railroad Company; NJ Transit Rail Operations, Inc., an instrumentality of the State of New Jersey, and the National Railroad Passenger Corporation.

No. 89-427

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, *et al.*,

Petitioners,

—v.—

THE LONG ISLAND RAILROAD COMPANY, *et al.*,

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BERNARD M. PLUM
PROSKAUER ROSE GOETZ
& MENDELSOHN
300 Park Avenue
New York, New York 10022
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Counsel for Respondents The Long Island Rail Road Company and Metro-North Commuter Railroad Company

Of Counsel

JOSEPH BAUMGARTEN
NEIL H. ABRAMSON

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Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-427

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, *et al.*,

Petitioners,

—v.—

THE LONG ISLAND RAILROAD COMPANY, *et al.*

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Long Island Rail Road Company and Metro-North Commuter Railroad Company (the "Railroads") oppose the petition filed by the International Association of Machinists, *et al.* (the "Unions") for a writ of *certiorari* to review the decision of the United States Court of Appeals for the Second Circuit in *Long Island R.R. v. International Ass'n of Machinists*, 874 F.2d 901 (2d Cir. 1989).

REASONS FOR DENYING THE PETITION

Concluding that the parties' collective bargaining agreements are reasonably susceptible to the Railroads' interpretation that sympathy strikes are not permitted (Pet. App. 25a), the Court of Appeals held that the District Court properly enjoined—pending arbitration—the Unions' threatened strike in sympathy with employees of Eastern Airlines. (Pet. App.

25a—26a)[1] That decision is consistent both with the decisions of this Court construing the RLA's "minor" dispute provisions, including *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 109 S. Ct. 2477 (1989), and with every other circuit court opinion that has decided whether a sympathy strike that raised a minor dispute could be enjoined pending arbitration.

The Petition does not challenge the conclusion that the threatened sympathy strike raises an arbitrable minor dispute. Instead, the Unions claim that the preliminary injunction is, "in everything but name, an across-the-board proscription of sympathy strikes in the railroad and airline industries" (Pet. 6) that requires review by this Court to resolve a so-called conflict among the circuits. The Unions claim also that the decision below conflicts with *Burlington Northern R.R. v. Brotherhood of Maintenance of Way Employes*, 481 U.S. 429 (1987), and with cases decided under the National Labor Relations Act. These claims are without merit and do not warrant further review.

I. THE INJUNCTION PRESERVES AND EFFECTUATES THE RLA'S MANDATORY DISPUTE RESOLUTION PROCEDURES

In order "to avoid any interruption to commerce or to the operation of any carrier therein," 45 U.S.C. §§ 151a(1), 152, First, the RLA prohibits employees and their unions from engaging in self-help without first exhausting one of the Act's mandatory dispute resolution procedures. *See Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 109 S. Ct. at 2480-81; *Detroit & Toledo Shore Line R.R. v. United Transportation Union*, 396 U.S. 142, 149-50 (1969). A strike called before exhaustion of the applicable dispute resolution procedure may be enjoined notwithstanding the Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq. See Chicago & North Western Ry. v. United Transportation Union*, 402 U.S. 570 (1971); *Brother-*

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1 References to pages in petitioners' appendix are designated as "Pet. App. _____." References to pages in the petition are designated at "Pet. _____."

hood of R.R. Trainmen v. Chicago River & Indiana R.R., 353 U.S. 30 (1957).

Which dispute resolution procedure is applicable depends on the nature of the dispute. "Major" disputes, which typically " 'relate[ ] to disputes over the formation of collective agreements or efforts to secure them,' "[2] must be resolved through a lengthy process of bargaining and mediation. *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 109 S. Ct. at 2480 (citation omitted).

"Minor" disputes, on the other hand, arise out of the interpretation or application of a collective bargaining agreement, and must be resolved through binding arbitration. 45 U.S.C. § 153. If a claim "is arguably justified by the terms of the parties' agreement (*i.e.*, the claim is neither obviously insubstantial or frivolous, nor made in bad faith)," then the dispute is minor and subject to arbitration. *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 109 S. Ct. at 2484.

Here, the Court of Appeals merely applied the "reasonably susceptible" test and upheld the District Court's conclusion that: (i) the parties' collective bargaining agreements are reasonably susceptible to the interpretation that sympathy strikes are not permitted; (ii) a minor dispute exists as to whether those agreements permit sympathy strikes; and (iii) the Unions were properly enjoined from striking pending arbitration of that dispute. (Pet. App. 23a-25a)

The Unions' characterization of that analysis and decision as "a return to the . . . regime" of *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921) (Pet. 6), could hardly be less apt. In *Duplex Printing*, decided before enactment of either the RLA or the NLRA, the Court held that a secondary boycott could be enjoined as an antitrust violation. That decision was nullified by the Norris-LaGuardia Act. *See Burlington North-*

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2 Major disputes also include, and the National Mediation Board ("NMB") has jurisdiction to mediate, *any* other dispute that is not a minor dispute. 45 U.S.C. § 155, First; *CSX Transportation, Inc. v. United Transportation Union*, 879 F.2d 990, 996 n.4 (2d Cir. 1989).

ern R.R. v. Brotherhood of Maintenance of Way Employes, 481 U.S. 429, 438-39 (1987).

The decision below does not enjoin lawful secondary activity; indeed such activity is expressly excluded from the scope of the injunction. (Pet. App. 27a) Nor does the decision below permanently enjoin the threatened sympathy strike. It merely preserves and effectuates the Act's dispute resolution processes—in this case arbitration—by enjoining the threatened strike pending arbitration. The decision to uphold that injunction bears no more resemblance to *Duplex Printing* than does *Chicago & North Western Ry.*, *Chicago River*, or any other decision authorizing injunctive relief to enforce the RLA's mandatory dispute resolution procedures.

The claim that the decision of the Court of Appeals constitutes "an across-the-board proscription of sympathy strikes" (Pet. 6) is also a gross exaggeration. The Unions have been enjoined from engaging in a sympathy strike only until an arbitrator determines that their collective bargaining agreements permit them to do so. They are (and at all times during the past seven months have been) free to arbitrate—and to seek expedited arbitration, *see Trans World Airlines v. International Ass'n of Machinists*, 629 F. Supp. 1554, 1562 (W.D. Mo. 1986)—but have chosen not to exercise that right. The effect of the injunction on the Unions' alleged "right" to strike is certainly not substantial enough to warrant review by this Court.

The assertion that the Court of Appeals' decision "cannot be squared" with *Burlington Northern* because it supposedly nullifies the effect of secondary picketing by striking Eastern employees (Pet. 15) is simply untrue. The Unions treat *Burlington Northern*'s holding, that courts may not enjoin secondary picketing by employees who have exhausted the major dispute procedures, as a guarantee to such employees of a right to have their picket lines honored. *Burlington Northern*, however, says nothing that suggests—and certainly does not hold—that employees of a secondary carrier may honor a picket line if doing so "would independently violate [their] own congres-

sionally mandated obligations under the RLA." (Pet. App. 28a).[3]

The Court of Appeals decision, moreover, reserves to *individual* employees of the Railroads the right to honor secondary picket lines. The court explicitly observed that "individual employees represented by the Unions are not parties to these actions, and may be subjected to the restraints of the injunctions only if 'in active concert or participation' with parties thereto." (Pet. App. 30a) In addition, the court noted that the striking Eastern employees "may still enlist for support third parties not subject to the strictures of the RLA." (Pet. App. 27a).

In short, the decision below does not limit the striking Eastern employees to "an enfeebled 'right' to publicize a labor dispute to members of the general traveling public." (Pet. 15) The decision carefully considers and gives effect both to the rights of employees engaged in a lawful strike, and to the obligations imposed by the RLA on employees who are bound to refrain from striking because *they* have not exhausted the statute's procedures. There is no need to review that decision because it is logical, sensible and fully consistent with this Court's prior decisions.

II. THERE IS NO SPLIT AMONG THE CIRCUITS AS TO WHETHER A SYMPATHY STRIKE THAT RAISES A MINOR DISPUTE MAY BE ENJOINED

The Court of Appeals decision is consistent with the decision of every other circuit court that has decided whether a sympathy strike that raises a minor dispute may be enjoined pending

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3 The Unions' reliance on *Trans World Airlines v. Independent Federation of Flight Attendants*, 109 S. Ct. 1225 (1989), is also misplaced. That case supports only the proposition that the RLA does not regulate the conduct of either party *after* its dispute resolution procedures have been exhausted. There is no suggestion that a union that has not exhausted those procedures may ignore them simply because another union is engaged in lawful picketing.

arbitration.[4] *See Southeastern Pa. Transportation Authority v. Brotherhood of R.R. Signalmen*, 882 F.2d 778 (3d Cir. 1989); *Trans International Airlines v. International Brotherhood of Teamsters*, 650 F.2d 949 (9th Cir. 1980), *cert. denied*, 449 U.S. 1110 (1981); *Northwest Airlines v. Air Line Pilots Ass'n*, 442 F.2d 246 (8th Cir. 1970), *aff'd*, 442 F.2d 251 (8th Cir.), *cert. denied*, 404 U.S. 871 (1971).

The Unions, therefore, seek to rephrase the question presented in a manner calculated to create the illusion of a split among the circuits. Posing the question, "[w]hether the federal courts have, *in general*, the authority to enter status quo injunctions, pending arbitration, against actions alleged to be in breach of an RLA collective bargaining agreement" (Pet. 1; emphasis added), the Unions then rely on decisions holding that an *employer* may not be enjoined from changing working conditions pending arbitration: *Air Line Pilots Ass'n v. Eastern Air Lines*, 863 F.2d 891 (D.C. Cir. 1988) and *International Ass'n of Machinists v. Eastern Air Lines*, 826 F.2d 1141 (1st Cir. 1987).[5] These decisions, the Unions claim, are in conflict with the decision of the court below.

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4 A number of district courts have also issued injunctions (pending arbitration) against sympathy strikes alleged to be in violation of a collective bargaining agreement. *Northwest Airlines v. International Ass'n of Machinists*, 712 F. Supp. 732 (D. Minn. 1989); *International Ass'n of Machinists v. Airline Industrial Relations Conference*, Civ. 89-0514 (D.D.C. March 16, 1989) (currently *sub judice* on appeal to the D.C. Circuit); *Trans World Airlines v. International Ass'n of Machinists*, 629 F. Supp. 1554 (W.D. Mo. 1986); *Puerto Rico International Airlines v. Air Line Pilots Ass'n*, 86 L.R.R.M. (BNA) 3189 (D.P.R. 1974); *Ozark Air Lines v. Air Line Pilots Ass'n*, 361 F. Supp. 198 (E.D. Mo.), *vacated on application of the parties*, 83 L.R.R.M. (BNA) 2923 (E.D. Mo. 1973). *But see Western Maryland R.R. v. System Bd. of Adjustment*, 465 F. Supp. 963 (D. Md. 1979).

5 The only discussion in either of these cases about a court's authority to enjoin a *strike*—as opposed to unilateral employer action—in the context of a minor dispute was the observation in *International Ass'n of Machinists v. Eastern Air Lines* that a court has authority "to grant this relief only when a union has struck and not otherwise." 826 F.2d at 1149.

Regardless of whether carrier action may be enjoined pending arbitration,[6] that issue has nothing at all to do with whether strikes may be enjoined. As the Unions reluctantly concede, courts simply do not equate strike injunctions with injunctions against other kinds of contract violations (Pet. 13-14 n.6), and properly so. The express and primary purpose of the RLA is "[t]o avoid any interruption to commerce or to the operation of any carrier therein." 45 U.S.C. §§ 151a(1), 152, First. *See Detroit & Toledo Shore Line R.R. v. United Transportation Union*, 396 U.S. 142, 148 n.13 (1969) (citation omitted) ("the major purpose of Congress in passing the Railway Labor Act was 'to provide a machinery to prevent strikes' "); *Texas & New Orleans R.R. v. Brotherhood of Railway & Steamship Clerks*, 281 U.S. 548, 565 (1930) ("The avoidance of industrial strife, by conference between the authorized representatives of employer and employee" is the RLA's "major objective"). The considerations that warrant injunctive relief against sympathy strikes simply have no relevance to injunctions against employer actions, and none of the decisions cited in the Petition suggests otherwise.

Nor are the decisions in *Eastern Air Lines v. Air Line Pilots Ass'n*, No. 89-5229 (11th Cir. March 24, 1989), and *Brotherhood of Locomotive Firemen v. Florida East Coast Ry.*, 346 F.2d 673 (5th Cir. 1965), in conflict with the decision below. Neither decision holds "that the federal courts . . . do not have the authority to enjoin sympathy strikes alleged to be in breach of contract." (Pet. 10)

In *Eastern Airlines v. Air Line Pilots Ass'n*, the Eleventh Circuit reversed the denial of Eastern's application for an injunc-

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6 This Court "never has recognized a general statutory obligation on the part of an employer to maintain the status quo pending [arbitration]." *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 109 S. Ct. at 2481. The lower courts, however, have differed on whether a status quo injunction may be issued against an employer in a minor dispute. *Compare CSX Transportation, Inc. v. United Transportation Union*, 879 F.2d 990, 1004 n.10 (2d Cir. 1989) *with Air Line Pilots Ass'n v. Eastern Air Lines*, 863 F.2d 891 (D.C. Cir. 1988) *and International Ass'n of Machinists v. Eastern Air Lines*, 826 F.2d 1141 (1st Cir. 1987).

tion prohibiting a strike by pilots who were seeking a new contract and had not exhausted the major dispute resolution procedures. The case was remanded to the district court to determine whether the strike was primary, *i.e.*, a strike in support of the pilots bargaining demands, or in sympathy with the IAM, which had been released from mediation.

Although the Eleventh Circuit mentioned that, "[o]rdinarily, it is lawful to honor picket lines," the court did not decide in its three page, unreported *per curiam* order whether Eastern had shown that the strike by its pilots raised a minor dispute, or whether an injunction should issue where, as here, the carrier has shown that its collective bargaining agreements are reasonably susceptible to the interpretation that sympathy strikes are not permitted.

Brotherhood of Locomotive Firemen v. Florida East Coast Ry., 346 F.2d 673 (5th Cir. 1965), is equally inapposite to whether a split in the circuits exists; it too did not decide whether the sympathy strike at issue raised a minor dispute. The plaintiff, a railroad whose employees were engaged in an economic strike, sought an injunction against a *secondary employer* (a port authority) and its employees (the sympathy strikers). Although the railroad argued that the sympathy strike was enjoinable because it involved a minor dispute between the Port Authority and its employees, the Court denied the injunction, noting that "[i]t is the [railroad] that seeks the injunction, not the Port Authority," *id.* at 676; that neither the Port Authority nor its employees had sought arbitration; and that an injunction thus was not necessary "to preserve the jurisdiction of the Board over any minor dispute between the Port Authority and its employees . . . ." *Id.*

In sum, this Court has held that courts may enjoin strikes pending arbitration, and there is no split among the circuits concerning the application of that principle to sympathy strikes that give rise to minor disputes.

III. THE COURT OF APPEALS CORRECTLY REFUSED TO APPLY NLRA PRINCIPLES

"The fundamental premises and principles of the Railway Labor Act are not the same as those which form the basis of the [NLRA]." *Brotherhood of R.R. Trainmen v. Chicago River & Indiana R.R.*, 353 U.S. 30, 31-32 n.2 (1957). *See also Trans World Airlines v. Independent Federation of Flight Attendants*, 109 S. Ct. 1225, 1233 (1989) (citations omitted) (the NLRA " 'cannot be imported wholesale into the railway labor arena' " and " 'even rough analogies must be drawn circumspectly with due regard for the many differences between the statutory schemes' "). The differences between the two statutes are most pronounced in the way that they each deal with strikes.

While the NLRA specifically protects both the right to engage in "concerted activity," 29 U.S.C. § 157, and the right to strike, 29 U.S.C. § 163, no such general rights are protected by the RLA. On the contrary, the RLA is designed to prevent strikes and prescribes detailed and mandatory procedures for the peaceful resolution of all labor disputes. (*See* pp. 2-3, *supra*)

The "clear and unmistakable waiver" doctrine advanced by the Unions (Pet. 16) is inimical to the RLA scheme. As the court observed in *Local 1395, International Brotherhood of Electrical Workers v. NLRB*, 797 F.2d 1027, 1029 (D.C. Cir. 1986) (citations omitted), the doctrine flows from the rights created by Section 7 of the NLRA:

> Under Section 7 of the [NLRA] . . . employees enjoy the right to observe lawful picket lines that they encounter in the course of their duties . . . . This right, however, may be waived by employees in collective bargaining agreements . . . . Still, waiver of the right to engage in sympathy strikes, like waiver of other rights under the Act, must be "clear and unmistakable."

The RLA, however, contains no analogue to Section 7. None of the cases cited by the Unions support the proposition that "[i]n the Railway Labor Act context, as in the National Labor Relations Act context, the proper rule is that a contractual

waiver of this basic statutory right [to engage in a sympathy strike] 'must be clear and unmistakable.' " (Pet. 15-16) Under the RLA, unions that have not exhausted the applicable dispute resolution procedure have no such "right" to waive.

As the Third Circuit observed in *Southeastern Pa. Transportation Authority v. Brotherhood of R.R. Signalmen*, 882 F.2d 778 (3d Cir. 1989), application of the "clear and unmistakable" standard to minor disputes would also conflict with the standard approved in *Consolidated Rail* for determining whether a minor dispute exists:

> [B]orrowing the "clear and unmistakable" standard from NLRA precedent is wholly inappropriate in the circumstance of the instant case. In *Consolidated Rail* the Supreme Court . . . stated that the appropriate standard for determining whether a minor dispute exists is whether the "disputed action of one of the parties can arguably be justified by the existing agreement." . . . . A requirement that SEPTA prove that the collective bargaining agreements clearly and unmistakably indicate that the unions waived their right to engage in a sympathy strike is fundamentally at odds with the standard set forth by the Supreme Court. As such, we conclude that SEPTA need only meet its relatively light burden of proving that the collective bargaining agreements can arguably be read to prohibit the unions from engaging in sympathy strike activity in order to categorize the instant dispute as a "minor" one within the parlance of the RLA.

882 F.2d at 783-84 (citations omitted).

The Unions' passing reference to *Buffalo Forge Co. v. United Steel Workers*, 428 U.S. 397 (1976), is likewise inapposite. *Buffalo Forge* holds that, under the NLRA, a sympathy strike cannot be enjoined pending arbitration because the NLRA leaves resolution of contractual disputes to the parties' own dispute resolution procedure, and because "there is no general federal anti-strike policy." 428 U.S. at 409.

Unlike the NLRA, however, the RLA is expressly designed to *prevent* strikes. And, unlike the NLRA, the RLA prescribes a detailed procedure for resolving disputes (without resort to self-help) that *requires* the parties: (1) to submit disputes over the interpretation or application of collective bargaining agreements to arbitration, 45 U.S.C. § 153; and (2) to exert every reasonable effort to resolve disputes and to make and maintain agreements in order to avoid any interruption to commerce or to the operation of any carrier. 45 U.S.C. § 152, First. All of the circuit courts that have addressed the issue have held that *Buffalo Forge* "is . . . inapposite in the RLA context." (Pet. App. 26a) *Southeastern Pa. Transportation Authority v. Brotherhood of R.R. Signalmen*, 882 F.2d 778 (3d Cir. 1989); *Trans International Airlines v. International Brotherhood of Teamsters*, 650 F.2d 949, 965-66 (9th Cir. 1980), *cert. denied*, 449 U.S. 1110 (1981). *See also Trans World Airlines v. International Ass'n of Machinists*, 629 F. Supp. 1554, 1557 (W.D. Mo. 1986); *Wien Air Alaska v. Teamsters*, 93 L.R.R.M. (BNA) 2934 (D. Alaska 1976).

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Dated: New York, New York
October 23, 1989

Respectfully submitted,

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No. 89-427

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

INTERNATIONAL ASSOCIATION OF MACHINISTS and AEROSPACE WORKERS, AFL-CIO, *et al.*,
Petitioners,

v.

THE LONG ISLAND RAILROAD COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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AMTRAK'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the District Court abuse its discretion or make a clear mistake of law when it granted the Railroads' request for a preliminary injunction against a threatened sympathy strike by their employees upon a finding that there was a substantial likelihood that the strike would violate provisions of the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151 *et seq.*?

2. Did the District Court abuse its discretion or commit a clear error when it preliminarily enjoined a threatened sympathy strike which would have arguably violated the collective bargaining agreement and thus raised a minor dispute subject to the arbitration procedures of the RLA?

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AMTRAK'S BRIEF IN OPPOSITION

Respondent, National Railroad Passenger Corporation ("Amtrak"), respectfully requests that this Court deny the Petition for a Writ of Certiorari filed by the International Association of Machinists, *et al.*, ("the Unions") to review the decision of the United States Court of Appeals for the Second Circuit in *Long Island R.R. v. International Ass'n of Machinists*, 874 F.2d 901 (2d Cir. 1989).[1]

REASONS FOR DENYING THE PETITION

I. THERE IS NO CONFLICT IN THE CIRCUITS

Every court of appeals that has addressed the issue has decided that a sympathy strike that would arguably violate the collective bargaining agreement between a car-

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[1] Amtrak has no parent companies, subsidiaries that are not wholly owned, or affiliates to disclose pursuant to Rule 28.1.

rier and its employees must be enjoined pending exhaustion of the RLA's dispute resolution procedures. *See Long Island R.R. v. International Ass'n of Machinists*, 874 F.2d 901 (2d Cir. 1989) (decision below); *Southeastern Pa. Transportation Authority v. Brotherhood of R.R. Signalmen*, 882 F.2d 778 (3d Cir. 1989); *Trans International Airlines v. International Brotherhood of Teamsters*, 650 F.2d 949 (9th Cir. 1980), *cert. denied*, 449 U.S. 1110 (1981); *Northwest Airlines v. Air Line Pilots Ass'n*, 442 F.2d 246 (8th Cir. 1970), *aff'd on rehearing*, 442 F.2d 251 (8th Cir.), *cert. denied*, 404 U.S. 871 (1971).

Despite this consistency among the circuits, the Unions have made two different attempts to contrive a division. However, both are unavailing. First, they attempt to create a division by citing two court of appeals decisions that are inapposite to the issues in the present case. In *Eastern Air Lines v. Air Line Pilots Ass'n*, No. 89-5229 (11th Cir. March 24, 1989), the Eleventh Circuit did not decide whether a sympathy strike arguably in violation of a collective bargaining agreement could be enjoined. Rather, the court only determined that a sympathy strike could be enjoined if it were a pretext for premature self-help.[2] In *Brotherhood of Locomotive Firemen & Enginemen v. Florida East Coast Ry.*, 346 F.2d 673 (5th Cir. 1965), a railroad, whose employees were lawfully on strike, sought an injunction prohibiting employees of another employer from honoring the picket line and refusing to work on its cars. The struck employer had no contractual relationship with the employees of the secondary employer. Thus, the court of appeals was not presented with and expressly did not consider the issue of whether the secondary employer could have obtained

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[2] The Eleventh Circuit's opinion is unpublished. According to the court's Internal Operating Procedures, this treatment reflects the panel's belief that the opinion has "no precedential value." *See* Internal Operating Procedures of the United States Court of Appeals for the Eleventh Circuit, 36-1.3.

an injunction requiring its employees to comply with their collective bargaining agreements. Neither of the decisions proffered by the Unions support their assertion that there is a split in the circuits on the issue presented here: Can a court enjoin a sympathy strike because it arguably violates the employees' obligations under their collective bargaining agreements.

Second, apparently recognizing that the purported split in the circuits is more illusion than reality, the Unions take another tack. They attempt to devise a split by expanding the question presented beyond the issue of the enjoinability of sympathy strikes: "Whether federal courts have, in general, the authority to enter status quo injunctions, pending arbitration, against actions alleged to be in breach of an RLA collective bargaining agreement." Petition at i. To rationalize their creation, the Unions assert that the Second Circuit's decision was based on "the broader theory that the federal courts can, in general, issue a status quo injunction in any RLA 'minor dispute' . . . ." Petition at 7. They claim that on this issue "the Court of Appeals law is in disarray." *Id.* at 7-8. Significantly, the Unions offer no citation to the Second Circuit's opinion in support of these assertions. Nothing in that opinion even suggests that the Second Circuit relied on such a broad theory.

Having created the question, the petition then cites cases that can be read to evidence a conflict in the circuits on the question of when a federal court may enjoin a carrier, pending arbitration, from taking actions that arguably violate a collective bargaining agreement.[3] Petition

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[3] The cases cited by the Union were *Air Line Pilots Ass'n v. Eastern Air Lines*, 863 F.2d 891 (D.C. Cir. 1988); *International Ass'n of Machinists v. Eastern Air Lines*, 826 F.2d 1141 (1st Cir. 1987); *International Ass'n of Machinists v. Frontier Airlines*, 664 F.2d 538 (5th Cir. 1981); *United Transportation Union v. Burlington Northern, Inc.*, 458 F.2d 354 (8th Cir. 1972). In none of these cases was a court deciding whether a strike could be

at 12-13. While Amtrak believes this conflict is principally semantic, that is beside the point, because this new question is not presented by this case. The issue here concerns the propriety of enjoining, pending exhaustion of the RLA's dispute resolution procedures, a sympathy strike that arguably violates the employees' collective bargaining agreements. As noted above, the courts of appeals that have considered this issue are unanimous in concluding that such strikes must be enjoined to effectuate the purposes of the Act.

II. THE SECOND CIRCUIT'S DECISION IS CONSISTENT WITH SUPREME COURT PRECEDENT

The decision below was well grounded in then existing Supreme Court precedent. It has been further bolstered by the Court's subsequent decisions in *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, —— U.S. ——, 109 S.Ct. 2477 (1989) and *Pittsburgh & Lake Erie R.R. v. Railway Labor Executives' Ass'n*, —— U.S. ——, 109 S.Ct. 2584 (1989).

"In adopting the [RLA], Congress endeavored to bring about stable relationships between labor and management in this most important national industry." *Brotherhood of R.R. Trainmen v. Chicago River & Indiana R.R.*, 353 U.S. 30, 40 (1957). The RLA's principal purpose was "to provide a machinery to avoid strikes." *Texas & New Orleans R.R. v. Brotherhood of Railway & Steamship Clerks*, 281 U.S. 548, 565 (1930). To achieve this purpose, Congress established procedures by which disputes between a railroad and its employees are to be resolved. *See Consolidated Rail Corp.*, 109 S.Ct. at 2480-81. *See also, Burlington Northern R.R. v. Brotherhood of Maintenance of Way Employees*, 481 U.S. 429, 444-45 (1987).

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enjoined. Significantly, both the First and Fifth Circuits recognized, in dicta, that a strike over a minor dispute can be enjoined. *Eastern Airlines*, 826 F.2d at 1149; *Frontier Airlines*, 664 F.2d at 542.

Generally categorized, RLA disputes are either major or minor.[4] "Major disputes seek to create contractual rights, minor disputes to enforce them." *Consolidated Rail Corp.*, 109 S.Ct. at 2480. A dispute is minor if the carrier's position "is arguably justified by the terms of the parties' collective bargaining agreement. Where, in contrast, the employer's claims are frivolous or obviously insubstantial, the dispute is major." *Id.* at 2482. The Act provides for major disputes to be resolved through negotiation and mediation, and for minor disputes to be resolved through arbitration. *Id.* at 2480-81; *Elgin, J. & E. Ry. v. Burley*, 325 U.S. 711 (1945).

Submission of disputes to the Act's resolution procedures is not voluntary, but mandatory. *See* 45 U.S.C. § 152 First; *Chicago & North Western Ry. v. United Transportation Union*, 402 U.S. 570 (1971); *Chicago River*, 353 U.S. 30. Compliance with those procedures is enforceable by injunction notwithstanding the Norris-LaGuardia Act, 29 U.S.C. §§ 101 *et seq.*, because "the specific provisions of the Railway Labor Act take precedence over the more general provisions of the Norris-LaGuardia Act." *Chicago River*, 353 U.S. at 42; *Chicago & North Western Ry.*, 402 U.S. at 581-84. Thus, federal courts have jurisdiction to enjoin strikes arising out of minor disputes. *Consolidated Rail Corp.*, 109 S.Ct. at 2481; *Pittsburgh & Lake Erie R.R.*, 109 S.Ct. at 2598; *Chicago River*, 353 U.S. at 40-42.

In this case, the Second Circuit correctly applied these fundamental principles of RLA jurisprudence in determining that the district court had not abused its discre-

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[4] A third type of dispute, involving the representational status of the employer's workforce, is inapplicable to the present controversy. Furthermore, it is clear that strikes over representational disputes are similarly unlawful and may be enjoined. *See, e.g., Air Cargo, Inc. v. Local Union 851, International Brotherhood of Teamsters*, 733 F.2d 241 (2d Cir. 1984); *Summit Airlines v. Teamsters Local Union No. 295*, 628 F.2d 787 (2d Cir. 1980).

tion in issuing a preliminary injunction against a sympathy strike by Amtrak's employees. There was more than ample support for the conclusion that a sympathy strike would arguably violate the agreements between Amtrak and its unions and consequently, that it raised a minor dispute subject to the mandatory dispute resolution procedures of the RLA.[5] Therefore, a preliminary injunction was properly issued to enforce compliance with the specific procedures of the RLA.

The Unions attempt to avoid this result by arguments based on this Court's decisions in *Buffalo Forge Co. v. United Steel Workers*, 428 U.S. 397 (1976) and *Burlington Northern*, 481 U.S. 429. Not surprisingly, their reliance on *Buffalo Forge* is slight. Every court of appeals that has addressed the question has found the rationale of that case inapplicable to the RLA.[6] *Buffalo Forge* was decided under the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151 *et seq.*, which expresses "no general federal anti-strike policy." *Buffalo Forge*, 428 U.S. at 409. Conversely, the RLA's primary purpose is to prevent strikes. *See* 45 U.S.C. § 151a(1); *Detroit & Toledo Shore Line R.R. v. United Transportation Union*, 396 U.S. 142,

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[5] The agreements between Amtrak and its Unions require employees to report to work as assigned. Moreover, the agreements specify in detail "the circumstances under which employees are relieved of their obligation to report to work." App. at 47a-48a. Employees are also required to obtain permission from their supervisor for any absence. *Id.* Nothing in these agreements permits employees to be absent because they are "honor[ing] the picket lines of others and Amtrak has disciplined employees for engaging in illegal strike activity pursuant to these rules." *Id.*

[6] *See Long Island R.R. v. International Ass'n of Machinists*, 874 F.2d 901 (2d Cir. 1989) (decision below); *Trans International Airlines v. International Brotherhood of Teamsters*, 650 F.2d 949 (9th Cir. 1980), *cert. denied*, 449 U.S. 1110 (1981); *Southeastern Pa. Transportation Authority v. Brotherhood of R.R. Signalmen*, 882 F.2d 778 (3d Cir. 1989); *Northwest Airlines v. Air Line Pilots Ass'n*, 442 F.2d 246 (8th Cir. 1970), *aff'd on rehearing*, 442 F.2d 251 (8th Cir.), *cert. denied*, 404 U.S. 871 (1971).

148 n.13 (1969); *Chicago River*, 353 U.S. at 37-39. Moreover, the NLRA does not require employers and unions to arbitrate contractual disputes, while the RLA specifically compels arbitration of such disputes. Therefore, under the NLRA, when a sympathy strike arguably would violate a collective bargaining agreement, there is no statutory obligation that could take precedence over the Norris-LaGuardia Act. In contrast, under the RLA, an injunction must issue against such a strike to enforce the statutory arbitration requirement. 353 U.S. at 40-42. As Justice Kennedy wrote while on the Ninth Circuit:

> The requirement of arbitration under the RLA is an essential part of the congressional purpose of avoiding interruption of the transportation industry. The minor dispute arbitration procedure was designed as a substitute for prearbitration strikes and we think this includes sympathy strikes [that arguably violate the collective bargaining agreement].

Trans International Airlines, 650 F.2d at 966. (citations omitted).

In a last effort to support their position, the Unions argue that the Second Circuit's decision is inconsistent with *Burlington Northern*. This assertion cannot survive scrutiny. In *Burlington Northern*, the Court held that the RLA does not prohibit employees who have exhausted the Act's bargaining procedures with their own employer from picketing other carriers. The decision did not release the employees of the secondary carriers from *their* contractual obligations. Indeed, the Court specifically found that Section 2 First of the RLA, 45 U.S.C. § 152 First, requires compliance with those obligations:

> [T]he RLA requires all parties both "to exert every reasonable effort to make and maintain" collectively bargained agreements and to abide by the terms of the most recent collective bargaining agreement until all the settlement procedures provided by the RLA have been exhausted.

481 U.S. at 445 (citations omitted). Nothing in the decision supports the Unions' position, which is, in essence, that exhaustion of the Act's procedures by employees of one company serves to release the employees at all of the other air and rail carriers in the country from their contractual and statutory commitments.[7]

Nor does *Burlington Northern* provide any support for the Unions' argument that the Second Circuit's decision is in effect a return to *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921). Indeed, it is the Unions who are invoking the discredited *Duplex Printing* approach by espousing a "general intuition about the political and economic significance" of sympathy strikes. *See Burlington Northern*, 481 U.S. at 438. The Unions point to nothing in the RLA or the collective bargaining agreements that supports their asserted "right" to engage in a sympathy strike. Instead, they argue that the strike should not have been enjoined because the injunction renders the strike by *Eastern's employees* less effective. The Unions would have the Court ignore the contractual commitments of *Amtrak's employees*, as well as their statutory obligation to abide by those commitments, 45 U.S.C. § 152 First, in order to strengthen the economic and political position of *Eastern's employees*. Such a decision would be contrary to this Court's analysis in *Burlington Northern*, as well as every other decision of the Court addressing the lawfulness of strikes under the RLA.

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[7] In *Brotherhood of R.R. Signalmen v. Southeastern Pa. Transportation Authority*, A-715 (Circuit Justice Brennan 1989), Justice Brennan refused to stay an injunction against a sympathy strike by SEPTA's employees during the Eastern Airlines dispute, stating it was unlikely that four justices would find the issue worthy of *certiorari*. This is particularly noteworthy given that Justice Brennan authored *Burlington Northern*.

CONCLUSION

Because the circuits are not split on the issues raised by this case and the Second Circuit's decision is fully supported by the precedent of this Court, Amtrak respectfully requests that the Court deny the petition for a writ of certiorari.

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No. 89-427

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Supreme Court of the United States
OCTOBER TERM, 1989

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Petitioners,

v.

THE LONG ISLAND RAILROAD COMPANY, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

ARGUMENT

The respondents' briefs in opposition attempt to prove that black is white; not surprisingly, their arguments against the grant of *certiorari* do not survive reasoned scrutiny.

1. The basic issue here, as the court of appeals framed it, is whether "the sympathy strike which [the Unions] propose is not a 'dispute' between the Unions and the Railroads, and therefore is not subject to the resolution procedures of the RLA." Pet. App. 22a.

The respondents argue that there is no circuit conflict on that question. Amtrak Br. in Opp. 1-2; LIRR Br. in Opp. 5-6. The court of appeals, however, *candidly acknowledged* that the unions' position "is not without case support." Pet. App. 22a (collecting cases). Most to the point in this regard, the Eleventh Circuit in *Eastern Air Lines v. Air Line Pilots Ass'n, Int'l*, No. 89-5229 (11th Cir. Mar. 24, 1989), ruled that a union engaged in a sympathy strike

> is not on strike over whether its strike is permitted by [its] present contract with [the carrier]; thus, the strike is not over a minor dispute under the RLA. Accordingly, an injunction cannot be warranted on this ground. *See Jacksonville Bulk Terminal v. Intern. Longshoremen's Ass'n*, 457 U.S. 702 (1982) (a National Labor Relations Act case). [Pet. App. 95a n.2]

To be sure, respondents cite court of appeals cases in line with the decision below and contrary to the *Eastern Air Lines v. ALPA* decision as if doing so somehow advances their position. *See* Amtrak Br. in Opp. 2; LIRR Br. in Opp. 6. But such disagreements are the stuff from which a circuit conflict requiring this Court's resolution is made.[1]

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[1] We note that aside from this case respondents cite another recent case pending before this Court, *Southeastern Pa. Transp. Auth. v. Signalmen*, 822 F.2d 778 (3d Cir. 1989), *petition for cert. filed*, No. 89-756, Nov. 13, 1989; a case holding that an injunction against a sympathy strike could issue if the district court was "satisfied that the sympathy strike clearly violates the no-strike clause or a controlling provision of the RLA," *Trans International Airlines v. Teamsters*, 650 F.2d 949, 966 & n.13 (9th Cir. 1980) (Kennedy, J.), *cert. denied*, 449 U.S. 1110 (1981); and a case that contains no reasoning and no citation to authority in support of the court's summary decision to enjoin a sympathy strike. *Northwest Airlines v. ALPA*, 442 F.2d 246, 249 (8th Cir. 1970), *aff'd*, 442 F.2d 251 (8th Cir.), *cert. denied*, 404 U.S. 871 (1971).

[Continued]

2. Respondents attempt to wish away the conflict on whether the Railway Labor Act authorizes *status quo* injunctions at all by stating:

> Regardless of whether carrier action may be enjoined pending arbitration, that issue *has nothing at all to do* with whether strikes may be enjoined. . . . [C]ourts simply do not equate strike injunctions with injunctions against other kinds of contract violations. [LIRR Br. in Opp. 7 (emphasis added). *See also* Amtrak Br. in Opp. 3.]

The one-sided rule that only union contract breaches—and not carrier contract breaches—justify *status quo* injunctions is, we submit, so unfair on its face as to be untenable. And the D.C. Circuit and First Circuit cases we cited at Pet. 13 do not embrace that rule.[2]

3. Respondents attempt to distinguish *Buffalo Forge Co. v. Steelworkers*, 428 U.S. 397 (1976), on the theory

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[1] [Continued]

On respondents' own showing there is a three-way split in the circuits: The Eleventh and the Fifth Circuits say no injunctions may issue in sympathy strike cases; the Second and Third Circuits say injunctions may issue if the carrier has an arguable "no strike" contract claim; and the Ninth Circuit says an injunction may issue if the carrier can show a clear "no strike" clause violation.

[2] *See ALPA v. Eastern Air Lines*, 863 F.2d 891, 895-96 (D.C. Cir. 1988) ("the arbitration board's jurisdiction over minor disputes is exclusive; the courts do not have jurisdiction to issue status quo injunctions"); *IAM v. Eastern Air Lines*, 826 F.2d 1141, 1145 (1st Cir. 1987) ("The policy against judicial involvement in labor disputes by way of injunctive relief is so strong that not even the specter of a national paralysis of the railroads by reason of secondary boycotts was considered sufficient to overcome Congress' withdrawal of jurisdiction.").

While respondents also rely on the long-settled rule that "[c]ourts may enjoin strikes arising out of minor disputes," *Consolidated Rail Corp. v. RLEA*, 109 S.Ct. 2477, 2481 (1989) (citing *Trainmen v. Chicago R. & I.R. Co.*, 353 U.S. 30 (1957)), the question decided in *Chicago River* is, as we have explained, entirely separate from the question presented here. *See* Pet. 11-12.

that the National Labor Relations Act "expresses 'no general federal anti-strike policy,'" while the RLA's "primary purpose is to prevent strikes." Amtrak Br. in Opp. 6 (quoting *Buffalo Forge*, 428 U.S. at 409). *See also* LIRR Br. in Opp. 10. There is no basis in law for this distinction. Neither federal labor statute encourages strikes; both protect strikes as lawful self-help. The Court has long recognized that "[p]eaceful primary strikes and picketing incident thereto lie within the core of protected self-help under the Railway Labor Act." *Trainmen v. Terminal Co.*, 394 U.S. 369, 386 (1969). And just last term the Court reaffirmed that "[our] cases have read the RLA to provide greater avenues of self-help to parties that have exhausted the statute's 'virtually endless' dispute resolution mechanisms than would be available under the NLRA." *TWA v. IFFA*, 109 S.Ct. 1225, 1233 (1989) (citations omitted).

4. Finally, respondents understate the impact of the injunctions on the protected self-help rights of IAM-represented Eastern employees as guaranteed by *Burlington Northern v. Maintenance Employes*, 481 U.S. 429 (1987). *See* LIRR Br. in Opp. 4-5. After all, they argue, the striking Eastern employees can still appeal to unspecified "third parties," and the court of appeals did not "permanently enjoin the threatened sympathy strike." *Id.* at 4.

But even that court readily "agree[d] that it is somewhat anomalous that secondary picketing is allowed by *Burlington Northern*, but considerably undercut in its effectiveness by the type of injunction entered here." Pet. App. 27a. The court of appeals readily agreed, too, that "'without the expectation that picket lines would be honored, picketing is of little practical effect.'" *Id.* (quoting *Western Maryland R.R. Co. v. System Board of Adjustment*, 465 F. Supp. 963, 975 (D. Md. 1979)). And as this Court held in *Buffalo Forge*, with specific reference to injunctions against sympathy strikes pending

arbitration, "even temporary injunctions very often permanently settle the issue." 428 U.S. at 412.

CONCLUSION

For the reasons stated above and in the petition, *certiorari* should be granted.

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